

1 Stacey Geis, CA Bar # 181444  
2 Earthjustice  
3 50 California St., Suite 500  
4 San Francisco, CA 94111-4608  
5 Phone: (415) 217-2000  
6 Fax: (415) 217-2040  
sgeis@earthjustice.org

7  
8 *Local Counsel for Plaintiffs in Case No. 4:18-cv-05984, Sierra Club, et al.*  
9 *(Additional Counsel Listed on Signature Page)*

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**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

STATE OF CALIFORNIA, by and through )  
XAVIER BECERRA, ATTORNEY ) Case No. 4:18-cv-05712-YGR  
GENERAL, and the CALIFORNIA AIR ) (Consolidated With Case No. 4:18-cv-05984-YGR)  
RESOURCES BOARD; and STATE OF )  
NEW MEXICO, by and through HECTOR )  
BALDERAS, ATTORNEY GENERAL, )  
Plaintiffs, ) Judge Assigned: Hon. Yvonne Gonzalez Rodgers  
v. )  
RYAN ZINKE, Secretary of the Interior; )  
JOSEPH R. BALASH, Assistant Secretary )  
for Land and Minerals Management, United )  
States Department of the Interior; UNITED )  
STATES BUREAU OF LAND )  
MANAGEMENT; and UNITED STATES )  
DEPARTMENT OF THE INTERIOR, )  
Defendants. )  
Date: January 14, 2020  
Time: 10:00 a.m.  
Location: Courtroom 1, Fourth Floor  
1301 Clay Street, Oakland, CA 94612

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1       In the face of a growing and well-documented problem of the waste of publicly owned oil  
 2 and gas resources, dramatic advances in the technology to prevent that waste, and a statutory  
 3 mandate to require “all reasonable precautions to prevent waste,” 30 U.S.C. § 225, the Bureau of  
 4 Land Management (BLM) decided to rescind all of the Waste Prevention Rule’s measures that it had  
 5 adopted just two years earlier (Rescission). Through the Rescission, BLM has persisted in its quest  
 6 to ensure that private operators do not need to expend money to conserve publicly owned gas, even  
 7 after this Court twice struck down previous attempts. BLM’s response brief in this case—which is  
 8 full of post hoc explanations and requests for this Court to defer blindly to the agency—is merely a  
 9 continuation of the agency’s hunt for legal and factual justifications to support its predetermined  
 10 result. BLM has failed. The Rescission violates the Mineral Leasing Act, Administrative Procedure  
 11 Act (APA), and National Environmental Policy Act (NEPA).

12       In an attempt to render irrelevant the public benefits of waste prevention—including  
 13 increased natural gas production, increased royalty payments, and environmental protections—BLM  
 14 codifies a new definition of “waste” that focuses entirely the an operator’s marginal profits. BLM’s  
 15 new operator profit policy would prohibit BLM from requiring an oil lessee generating millions of  
 16 dollars from adopting a measure costing a few thousand dollars that would triple gas savings just  
 17 because that measure costs slightly more to implement than the additional revenue produced by the  
 18 gas savings. This operator-driven approach is flatly inconsistent with Congress’s intent in the  
 19 Mineral Leasing Act and not entitled to deference because, contrary to BLM counsel’s post hoc  
 20 attempt to argue otherwise, it ignores the public’s interest entirely. Compounding this fundamental  
 21 problem, BLM applies its unlawful waste definition selectively, relying on it to get rid of provisions  
 22 to which operators objected, dismissing the definition when it would lead to retaining such  
 23 provisions, and ignoring it altogether when determining which longstanding provisions to leave  
 24 undisturbed. This outcome-driven charade is plainly arbitrary and capricious and not entitled to  
 25 deference.

26       Nor does the factual record support the Rescission. BLM’s response does not seriously  
 27 dispute that the Rescission does not advance (and in some cases impedes) the goals of promoting  
 28 energy production, investment, and jobs on which BLM claims it is based. Instead, the agency

1 claims that the Rescission, which applies to all wells, is justified by reducing burdens for a subset of  
 2 the lowest-producing marginal wells. Even there, BLM’s brief retreats from the only evidence it had  
 3 previously identified—a flawed marginal well analysis that it never subjected to public scrutiny in  
 4 violation of the APA. BLM tries to prop up its burden claim by pointing to its cost-benefit analysis.  
 5 But this analysis is principally based on an “interim” and unscientific social cost of methane, quickly  
 6 cobbled together for the sole purpose of supporting deregulation. BLM’s main response is that this  
 7 Court should defer to the agency’s use of bad science. However, the “deference accorded an  
 8 agency’s scientific or technical expertise is not unlimited.” *Brower v. Evans*, 257 F.3d 1058, 1067  
 9 (9th Cir. 2001). Here, BLM stretches it far past its breaking point.

10 BLM’s defense of its cursory environmental analysis fares no better. BLM’s supposed  
 11 “comprehensive” analysis utterly ignores the Rescission’s impacts on “at risk communities” living in  
 12 areas that already violate federal health standards and Native Americans disproportionately impacted  
 13 by oil and gas drilling, and falsely claims that there are no metrics for analyzing the Rescission’s  
 14 climate impacts. BLM attempts to hide behind the agency’s 2016 environmental analysis for the  
 15 Waste Prevention Rule, but this cannot substitute for the required “hard look” at the *Rescission’s*  
 16 significant impacts. A more comprehensive environmental impact statement is required.

17 Fundamentally, instead of preventing the waste of publicly owned resources, the Rescission’s  
 18 purpose and effect is to prevent any costs, however minor, to oil and gas companies exploiting those  
 19 resources—a result at odds with the statutory text and unsupported in the record. As a last-ditch  
 20 effort, BLM asks this Court not to impose the default remedy of vacatur of the Rescission and  
 21 reinstatement of the Waste Prevention Rule on the basis of its own prior unlawful attempts to scuttle  
 22 that Rule. Under controlling Ninth Circuit precedent, this Court should declare the Rescission  
 23 unlawful, vacate it in its entirety, and reinstate the Waste Prevention Rule.

## 24 ARGUMENT

### 25 I. BLM Unlawfully Justifies the Rescission by Arbitrarily Applying a Definition of 26 “Waste” that Violates Congress’s Intent (Issue A).

27 Contrary to BLM’s assertions, its new definition of waste is not entitled to deference because  
 28 it ignores the public’s interests. In 2016, BLM recognized that the public was suffering the impacts

1 of industry’s wasteful practices—through loss of publicly owned gas and royalty payments and due  
 2 to air and climate impacts from vented, flared, and leaked gas. *See, e.g.*, AR915. BLM  
 3 acknowledged that the Mineral Leasing Act “rests on the fundamental principle that the *public*  
 4 should benefit from mineral production on public lands,” and that an “important means of ensuring  
 5 that the public benefits . . . is minimizing and deterring waste.” AR920–21 (emphasis added).  
 6 Relying on its statutory obligations to require “all reasonable precautions to prevent waste,” 30  
 7 U.S.C. § 225, for the “safeguarding of the public welfare” and the “protection of the interests of the  
 8 United States,” *id.* § 187, and to “protect the quality of . . . air and atmospheric . . . values,” 43  
 9 U.S.C. § 1701(a)(8), BLM adopted cost-effective regulations to address the waste problem. AR910,  
 10 921. BLM also recognized that simply looking at what is a “rational decision for an individual  
 11 operator” does not “account for the broader impacts of venting and flaring, including the cost to the  
 12 public of losing gas that would otherwise be available for productive use, the loss of royalties that  
 13 would otherwise be paid to States, tribes, and the Federal Government on the lost gas, and the air  
 14 pollution and other impacts of gas wasted through venting or flaring.” AR1014.

15 In 2018, BLM ignored its obligation to protect the public interest altogether, claiming “its  
 16 waste prevention authority did not sweep broadly to address societal or environmental impacts.”  
 17 Dfts’ Cross Mot. for Summ. J. 38, ECF 123 (Aug. 12, 2019) (BLM Br.). Instead, BLM was laser  
 18 focused on rescinding requirements to which industry objected and “allow[ing] operators to continue  
 19 implementing waste reduction strategies and programs that they find successful,” AR1—but that are  
 20 responsible for the growing waste problem. To achieve this goal, BLM redefines “waste” to focus  
 21 solely on the marginal profitability of the waste prevention measure for the operator:

22 *Waste of oil or gas* means any act or failure to act by the operator that is not sanctioned  
 23 by the authorized officer as necessary for proper development and production, *where*  
 24 *compliance costs are not greater than the monetary value of the resources they are*  
*expected to conserve.*

25 43 C.F.R. § 3179.3 (emphasis added). Under this definition, even if a requirement would create  
 26 substantial benefits to the public to whom the gas belongs at a trivial cost to operators, it does not  
 27 prevent “waste” unless in implementing it a private operator would profit (or at least break even).

1 *See* BLM Br. at 48 (“[F]oregone public health benefits . . . are not relevant to BLM’s consideration  
 2 . . . whether compliance costs outweigh the value of the gas to be conserved.”).<sup>1</sup>

3 BLM claims that this Court must grant *Chevron* deference to its new definition of waste  
 4 because the Mineral Leasing Act does not define the term. BLM Br. 12. In doing so, BLM asks this  
 5 Court to ignore the plain language, context, and purpose of the Act—all of which demonstrate that  
 6 BLM cannot ignore the public interest in regulating waste. Indeed, BLM’s single-minded focus on  
 7 rescinding public protections to benefit operators’ marginal profits—and selective application of the  
 8 definition to achieve this goal—is not permissible or reasonable under the Mineral Leasing Act.

9       **A. BLM’s operator profit policy is counter to Congress’s clear intent (Issue A-1).**

10 BLM’s new definition of waste fails at the first step of the *Chevron* analysis. On the question  
 11 of whether BLM may look exclusively at the marginal profitability of private operators—to the  
 12 exclusion of the public’s interest—when interpreting the statutory term waste, Congress spoke  
 13 clearly, and said “no.” The text, context, and purpose of the Mineral Leasing Act demonstrate that  
 14 the statute precludes BLM’s new operator profit policy. *See The Wilderness Soc’y v. U.S. Fish &*  
 15 *Wildlife Serv.*, 353 F.3d 1051, 1060–62 (9th Cir. 2003) (en banc) (holding Congress “spoke clearly”  
 16 to preclude “commercial enterprise[s]” from wilderness areas, an undefined term in the Wilderness  
 17 Act, given the term’s dictionary definition, the Act’s broad purposes, and the Act’s structure, which  
 18 repeatedly emphasized wilderness protection); *see also Tovar v. Sessions*, 882 F.3d 895, 900–05 (9th  
 19 Cir. 2018) (holding Congress clearly intended the term “age” to mean statutory age, rather than  
 20 biological age, given statute as a whole and the fact that statutory subsections may not be read in  
 21 isolation); *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 832–33 (9th Cir. 2009) (holding  
 22 undefined statutory term was unambiguous based on plain meaning and statutory context).

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 25 <sup>1</sup> BLM attempts to downplay its definition as simply containing an “economic component.” BLM  
 26 Br. 11. In fact, the new definition turns entirely upon an operator’s marginal profits, and it is solely  
 27 this basis that BLM uses as a justification to rescind the Waste Prevention Rule’s provisions. *See, e.g.*, AR12 (“Because previous § 3179.202 imposed compliance costs greater than the value of the  
 28 resources it was expected to conserve, the BLM does not consider it to be an appropriate ‘waste prevention’ requirement, and is rescinding it in its entirety.”).

1       In the Mineral Leasing Act, Congress put BLM squarely in charge of leasing publicly owned  
 2 oil and gas to private operators. *See* Citizen Groups' Mot. for Summ. J. 6–7, ECF 109 (June 7, 2019)  
 3 (Citizens Br.). To protect the public's interest, Congress directed BLM to require operators to “use  
 4 *all* reasonable precautions to prevent waste,” 30 U.S.C. § 225 (emphasis added), and to ensure leases  
 5 contained provisions for the “prevention of undue waste,” *id.* § 187. The mandate to prevent waste is  
 6 found alongside other public interest-centered requirements, such as protecting the “interests of the  
 7 United States” and “safeguarding . . . the public welfare.” *Id.* Indeed, *all* of the conditions that  
 8 Congress mandated BLM to include in leases through the Mineral Leasing Act have the goal of  
 9 protecting the public from private operators only focused on their profits. For example, in addition to  
 10 requiring BLM to prevent undue waste and safeguard the public welfare, § 187 requires provisions  
 11 protecting “the safety and welfare of the miners,” “prohibiting the employment of any child,”  
 12 “requiring the payment of wages at least twice a month in lawful money,” and “for the prevention of  
 13 monopoly.” *Id.* The Act's text thus demonstrates that Congress's purpose was to impose on the  
 14 federal government the duty to protect the public interest, including by ensuring that operators  
 15 prevent waste. By contrast, nothing in the text suggests that BLM may focus exclusively on private  
 16 operators' profit interests when implementing its statutory waste prevention duties. And BLM  
 17 identifies no textual language suggesting as much.

18       BLM points to the statutory language qualifying that it must prevent “[un]reasonable” or  
 19 “undue” waste. BLM Br. 12. But these qualifiers demonstrate that Congress viewed the term  
 20 “waste” as an expansive one. Indeed, BLM's restrictive interpretation of waste renders these  
 21 qualifiers unnecessary and meaningless. If loss of gas is only “waste” when it is cheaper for a  
 22 particular operator to capture it than to release it into the air, it is difficult to see when waste might  
 23 not be “undue” or when a precaution would not be “reasonable.” *Nguyen v. Sessions*, 901 F.3d 1093,  
 24 1098 (9th Cir. 2018) (“Because the BIA's interpretation impermissibly renders a portion of the rule  
 25 superfluous, there is no ambiguity that would require us to exercise [Chevron] deference.”); *see also*  
 26 *Yith v. Nielsen*, 881 F.3d 1155, 1165–67 (9th Cir. 2018) (noting that courts must employ traditional  
 27 “tools of statutory interpretation,” including the canon against surplusage, in determining whether  
 28

1 Congress spoke directly to the question).<sup>2</sup> In contrast, the Waste Prevention Rule appropriately  
 2 adopted a broad view of waste and then exercised the agency’s discretion to determine when that  
 3 waste was undue (based on lost production royalties and environmental impacts), and when there  
 4 were reasonable precautions to prevent it (based on technical feasibility and cost). *See* AR910  
 5 (concluding that the requirements were “economical, cost-effective, and reasonable measures . . . to  
 6 minimize gas waste,” and to “enhance our nation’s natural gas supplies, boost royalty receipts for  
 7 American taxpayers, tribes, and States, [and] reduce environmental damage”).<sup>3</sup>

8 American Petroleum Institute (API) claims that the Mineral Leasing Act’s “public welfare”  
 9 requirement should not “subsume[] or supersede[]” its requirement to prevent waste. Am. Petrol.  
 10 Inst. Cross Mot. for Summ. J. 12, ECF 126 (Aug. 26, 2019) (API Br.). The waste requirement,  
 11 however, “must be read in [its] context with a view to [its] place in the overall statutory scheme.”  
 12 *The Wilderness Soc’y*, 353 F.3d at 1060 (quotation marks omitted). The stated requirement to  
 13 safeguard public welfare, along with numerous other provisions requiring BLM to protect the public  
 14 and workers from operators seeking only to maximize profits, demonstrates Congress’s intent that  
 15 BLM regulate private operators to protect the public interest, including by preventing waste. The  
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 20 <sup>2</sup> To the extent BLM’s lawyers contend in reply that the Rescission merely determines what waste  
 21 prevention requirements are “reasonable” rather than redefining “waste,” BLM’s lawyers are  
 22 rewriting the regulation and their arguments must be rejected. *See Sec. & Exch. Comm’n v. Chenergy*  
*Corp.*, 318 U.S. 80, 94–95 (1943). If this was true, BLM would not need to adopt the Rescission’s  
 23 new and restrictive definition of “waste,” upon which its decisions to rescind the waste-preventing  
 24 provisions of the Waste Prevention Rule entirely depend. *See supra* p. 4 n.1. Regardless, by  
 25 completely abdicating its obligations to the public, BLM has not taken “*all* reasonable precautions to  
 26 prevent waste.” 30 U.S.C. § 225.

27 <sup>3</sup> Intervenors devote large parts of their briefs to arguing that the Waste Prevention Rule itself was  
 28 unlawful. *See, e.g.*, State of Wyo. Cross Mot. for Summ. J. 16–19, ECF 125 (Aug. 26, 2019) (Wyo.  
 Br.). It was not, but those arguments are not relevant here. The Waste Prevention Rule, and the  
 record upon which it was based, “is not before th[is] Court.” *See Ctr. for Biological Diversity v.*  
*BLM*, --F. Supp. 3d--, 2019 WL 2635587, at \*30–31 (N.D. Cal. June 20, 2019). If the Rescission  
 Rule is unlawful, it must be vacated, and Intervenors are then free to challenge a reinstated Waste  
 Prevention Rule.

1 Rescission's new definition of "waste" contradicts this intent by ignoring the public interest, and  
 2 neither BLM nor API has any textual response.<sup>4</sup>

3       **B.      BLM's operator profit policy is not a permissible interpretation of BLM's**  
 4 **obligation to prevent waste (Issues A-1, A-2).**

5       Even if this Court determines that the term "waste" is ambiguous, BLM's new definition is  
 6 not a "permissible" interpretation and therefore fails under *Chevron* step two. *Davis v. EPA*, 348  
 7 F.3d 772, 783–84 (9th Cir. 2003) (rejecting agency interpretation at *Chevron* step 2 where it would  
 8 "prevent[] consideration of a factor that Congress stated was relevant" and interfere with a goal of  
 9 the statute); *Akhtar v. Burzynski*, 384 F.3d 1193, 1199–1202 (9th Cir. 2004) (invalidating an agency  
 10 interpretation at *Chevron* step two after considering the statute's "language, structure, subject matter,  
 11 context, and history"). As discussed *supra* pp. 4–6, BLM's new definition does not satisfy the  
 12 Mineral Leasing Act's purpose of protecting the public and is therefore not permissible.

13       Indeed, BLM's interpretation ignores the problem of excessive waste and the impacts to the  
 14 public. *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015) ("Although this term leaves agencies with  
 15 flexibility, an agency may not 'entirely fai[l] to consider an important aspect of the problem' when  
 16 deciding whether regulation is appropriate." (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*  
 17 *Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*)); *Davis*, 348 F.3d at 783–84  
 18 (rejecting agency interpretation that allowed EPA to ignore harm the Clean Air Act was intended to  
 19 prevent and thereby "miss[] the forest for the trees"). Here, faced with well-documented evidence of  
 20 harm to the public from venting, flaring, and leaks on federal and Indian leases, BLM unreasonably  
 21 chose to define "waste" in a way that will ensure that nothing will be done to address this harm. *See*  
 22 *Citizens Br.* 14–15. As BLM acknowledges, the Rescission will *reduce* the amount of gas produced  
 23 from federal and Indian leases by 299 billion cubic feet, reduce royalties paid to the public by \$79.1  
 24 million, and increase air pollution and greenhouse gas emissions. AR22, 81. Likewise, BLM

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 26       <sup>4</sup> Contrary to Intervenors' contentions, API Br. 11, the Citizen Groups have never claimed that the  
 27 Waste Prevention Rule is "compelled" by the governing statute, or the *only* way that BLM may  
 28 lawfully carry out its waste prevention duties. The Citizen Groups simply maintain that that  
 Rescission Rule is an unlawful abdication of those duties.

1 concedes that its decision to rescind the gas capture requirements and defer to state venting and  
 2 flaring regulations will not necessarily lead to *any* reduction in the rampant flaring on public lands  
 3 that has devastating impacts to nearby residents. AR20; *see* Citizens Br. 30 (flaring can be as loud as  
 4 a jet engine and light up the night sky bright as day). BLM took these steps despite the fact that cost-  
 5 effective technologies that some states are effectively requiring operators to use are the same or  
 6 similar to those contained in the Waste Prevention Rule, AR84189–90—a fact that BLM does not  
 7 dispute. But instead of addressing these public threats with the available tools, BLM redefined  
 8 “waste” to focus solely on operators’ marginal profits. Just as the Supreme Court found EPA’s  
 9 failure to consider cost was impermissible in *Michigan*, 135 S. Ct. at 2711, this Court should find  
 10 BLM’s failure to consider the public interest is impermissible here.

11 Unable to find textual support for its operator profit policy, BLM attempts to rely on cherry-  
 12 picked statements from early congressional hearings about what eventually became the Mineral  
 13 Leasing Act in 1920, and BLM’s supposed “historic practice”—none of which can overcome  
 14 Congress’s clear intent as expressed in the Act. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct.  
 15 2356, 2364 (2019) (“Where . . . [an examination of the ordinary meaning and structure of the law]  
 16 yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history  
 17 will never allow it to be used to muddy the meaning of clear statutory language.”) (internal  
 18 quotations and citations omitted). Moreover, viewed as a whole, the legislative history BLM cites  
 19 only confirms the primary purpose of the Mineral Leasing Act: to constrain unfettered private  
 20 development by putting the Interior Department in charge of regulating private development on  
 21 public lands. *See* BLM Br. 12 (resources “belong” to the public”); *id.* at 13 (Mineral Leasing Act  
 22 was enacted in response to “rampant fraud and speculation and the monopolizing of public resources  
 23 by a handful of private companies.”); *see also* Citizens Br. 7–8.

24 But even the Mineral Leasing Act “purposes” that BLM selectively gleans from the  
 25 legislative history—“promot[ing] wise development of [federal] natural resources,” “obtain[ing] for  
 26 the public a reasonable financial return on assets that ‘belong’ to the public,” and “offering  
 27 prospectors a reasonable rate of return”—fundamentally fail to support the agency’s fixation solely  
 28 on operators’ marginal profits. BLM Br. 12–15 (citations omitted). For example, with respect to  
 Citizen Groups’ Opposition to Cross-Motions and Reply in Support of Motion for Summary  
 Judgment, Case No. 4:18-cv-05712-YGR (Consolidated with No. 4:18-cv-05984-YGR)

1 promoting wise development and obtaining reasonable financial returns for the public, the record  
 2 shows that the Rescission will significantly *reduce* natural gas production and royalties paid to  
 3 public coffers. AR22. As that fact demonstrates, BLM’s argument wrongly assumes that any waste  
 4 prevention requirement that does not pay for itself hinders production, leading to absurd results.  
 5 BLM’s policy would prevent the agency from requiring an oil lessee generating millions of dollars  
 6 in revenues from adopting a measure costing a few thousand dollars that would double or triple gas  
 7 savings just because that measure costs slightly more to implement than the additional revenue  
 8 produced by its gas savings. *See Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005) (finding  
 9 impermissible “an interpretation that would lead to an absurd result.” (citation omitted)). Such an  
 10 approach protects operators’ marginal profitability at the expense of the public interest in preventing  
 11 waste and is a far cry from the “wise” and “orderly” development of publicly owned resources that  
 12 BLM concedes Congress intended to promote. BLM Br. 12–13.<sup>5</sup>

13 With respect to BLM’s dubious claims that Congress’s chief purpose was to “reward[] the  
 14 prospector,”<sup>6</sup> there is a “logical gap” between this motivation and the Rescission. *Ctr. for Biological*  
*Diversity v. BLM*, --F. Supp. 3d---, 2019 WL 2635587, at \*23 (C.D. Cal. June 20, 2019). The record  
 15 reveals that despite rescinding all of the waste-preventing provisions of the Waste Prevention Rule,  
 16 the Rescission will have little to no effect on operator’s economic interests, their incentives to  
 17 develop resources, or their rates of return. *See infra* pp. 20–21. Indeed, BLM concludes that the  
 18 Rescission will increase *small* operator profits by only 0.19%. AR23. That is because BLM’s new  
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 21<sup>5</sup> BLM suggests that the Waste Prevention Rule’s requirements that operators capture a certain  
 22 percentage of released gas would lead to underground waste. BLM Br. 13. But it acknowledges that  
 23 it adopted those requirements in response to waste of public gas from oil wells due to inadequate  
 24 infrastructure. AR1013–14. *Deferring* production until infrastructure is built is different than  
*abandoning* resources. *Contra* BLM Br. 14. Rather, it is “wise” and “orderly” development.

25<sup>6</sup> Even BLM’s cherry-picked citations do not support its operator profit policy. The same House  
 26 Report that discusses “reward[ing] the prospector,” BLM Br. 13–14, states on the next page that the  
 27 “provisions relative to continued development to prevent waste and speculation are inserted in the  
 28 bill that will not work too great a hardship on the developer and that will at the same time practice  
 conservation of this resource . . . in which we all feel a keen interest in the prevention of its waste in  
 any form,” H. Rep. No. 64-17 (Jan. 4, 1916). In other words, Congress expected operators would  
 have to bear some costs to protect the public interest.

1 “waste” definition takes a microscopic focus on the marginal economics of each individual  
 2 requirement irrespective of how those costs will affect the overall economics of a lease or an  
 3 operator as a whole. But whether a particular requirement pays for itself or generates a profit on an  
 4 individual well does not indicate whether operators have sufficient incentives to produce. Indeed,  
 5 regulatory compliance costs are relatively small relative to both operator revenues and total business  
 6 costs, which are much more affected by factors like drilling and labor costs, the gas market, and the  
 7 price of leases. *See* AR96435. That is why API’s assertion that no operator would continue to  
 8 operate under the Waste Prevention Rule is false. API Br. 2. In fact, operators continue to invest  
 9 heavily in oil and gas resource in states with regulations similar to the Waste Prevention Rule. *See*  
 10 AR61 (describing Colorado’s similar regulations), AR825 (noting that oil production in Colorado  
 11 increased by 22% after the state adopted its regulations in 2014).

12 BLM also claims that it is returning to its historic interpretation of waste as “accounting for  
 13 the economics of preventing the loss.” BLM Br. 17; *see* API Br. 6–8. In fact, BLM is creating an  
 14 entirely new standard that looks not at overall lease or operator economics, but instead focuses solely  
 15 on the marginal profits of operators from executing the specific waste prevention measure. Nothing  
 16 in BLM’s prior regulations—in place for nearly forty years—supports this approach. Citizens Br. 9–  
 17 10. Indeed, if BLM’s operator profitability definition of waste were truly the historic practice, there  
 18 would be no reason for BLM to *change* its regulatory definition now. *Id.* (discussing 43 C.F.R.  
 19 § 3160.05 (historic definition of waste)). BLM’s response is merely to point out that the preexisting  
 20 waste definition is in § 3160, which contains general provisions applicable to all onshore oil and gas  
 21 operations, but that it “modified that definition to fit the waste prevention context.” BLM Br. 18.  
 22 This makes no sense—there is no other context for the waste definition. That BLM adopted new  
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1 waste prevention regulations does not change the fact that it already had an existing definition of  
 2 waste that contained no reference to an operator's marginal profits. 43 C.F.R. § 3160.0-5.<sup>7</sup>

3 The same is true for BLM's prior regulation governing venting and flaring, NTL-4A.  
 4 Notably, while explaining that NTL-4A embodied BLM's historic waste prevention authorities,  
 5 BLM Br. 3, 16–17, BLM does not actually quote the language of that regulation. In fact, NTL-4A  
 6 did not contain any language that allowed operators to vent or flare so long as the marginal cost of  
 7 curtailing venting or flaring was more than the value of the gas conserved. To the contrary, NTL-4A  
 8 provided that BLM could only approve venting or flaring of oil well gas if it was justified by “an  
 9 evaluation report supported by engineering, geologic, and economic data which demonstrates” *both*:

10 [1] that the expenditures necessary to market or beneficially use such gas are not  
 11 economically justified *and* [2] that conservation of the gas, if required, would lead to  
 12 the premature abandonment of recoverable oil reserves and ultimately to a greater loss  
 13 of equivalent energy than would be recovered if the venting or flaring were permitted  
 14 to continue . . .

15 AR3013 (emphasis added). NTL-4A further specified that “[w]hen evaluating the feasibility of  
 16 requiring conservation of the gas,” BLM must examine not simply whether the requirement pays for  
 17 itself, but take into account “the total leasehold production, including both oil and gas, as well as the  
 18 economics of a fieldwide plan” to determine “whether the *lease* can be operated successfully if it is  
 required that the gas be conserved.” AR3014 (emphasis added).

19 Accordingly, to demonstrate that conserving gas was not “economically justified,” operators  
 20 needed to evaluate the marginal cost of curtailing venting or flaring against the “total leasehold  
 21 production,” considering economics broadly, not against the marginal profits from conserving the  
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23 <sup>7</sup> Nor does BLM adequately respond to the Citizen Groups' argument that its historic practice  
 24 explanation conflates the Mineral Leasing Act's reasonable diligence and waste prevention  
 25 requirements, Citizens Br. 8. Offering an impermissible and flawed post hoc interpretation of the  
 26 statute, *see Cal. Pub. Utils. Comm'n v. Fed. Energy Regulatory Comm'n*, 879 F.3d 966, 975 (9th  
 27 Cir. 2018), BLM's lawyers now argue that section 187 of the Act contains an “umbrella provision”  
 28 and, after the first semicolon, “examples of the specific types of provisions within the broad  
 umbrella.” BLM Br. 15 n.6. There is no support for this interpretation. Section 187 contains a series  
 of directions about which lease provisions BLM must include, all separated by semicolons and  
 beginning with “provisions . . .” or “a provision . . .” 30 U.S.C. § 187. There is nothing in the text  
 or context to suggest that the first is an umbrella provision.

1 gas. *See Rife Oil Properties, Inc.*, 131 IBLA 357, 377 (1994) (considering whether waste-preventing  
 2 requirement would make “*production uneconomic*” (emphasis added)). And even that was not  
 3 sufficient: operators also needed to show that it would lead to premature abandonment of  
 4 recoverable resources. This test is not the same as BLM’s operator profit policy; it is more like the  
 5 Waste Prevention Rule, which contained exemptions from all of its requirements where compliance  
 6 would lead operators to abandon resources. *See, e.g.*, AR913, 956, 957. Accordingly, there is no  
 7 merit to BLM’s claims that its waste definition is a return to its historic practice.

8 The remainder of BLM’s and API’s historic practice arguments merit little response. Most of  
 9 them conflate the fact that the historic practice includes consideration of the economics of the lease  
 10 *as a whole* with BLM’s brand new attempt to look only at the marginal profitability of specific  
 11 requirements.<sup>8</sup> The Citizen Groups agree with BLM that the historic practice is to take *both* the  
 12 interests of the lessor and lessee into account. BLM Br. 15. But the Rescission’s new operator profit  
 13 policy *only* counts the interests of the lessee. *See supra* pp. 3–4. The historic practice recognizes that  
 14 regulators must reconcile the lessee’s interests in profiting from its wells with the public’s interest in  
 15 wise management that accounts for the negative externalities created by private operators. Notably,  
 16 neither BLM nor API have any response to the Supreme Court cases so holding that the Citizen  
 17 Groups cited in their opening brief. Citizens Br. 9 n.5 (citing *Henderson Co. v. Thompson*, 300 U.S.  
 18 258, 264 (1937) and *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 185–86 (1950)).

19 Indeed, while API contends that the Mineral Leasing Act was “enacted against [the]  
 20 background” of a number of sources that *postdate* the Act’s passage, API Br. 6–7, sources that  
 21 predate the Act and thus provide evidence of the “meaning . . . prevailing at that time,” permitted  
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23 <sup>8</sup> For example, the treatise that API cites, API Br. 6, does not support looking at the marginal  
 24 profitability of a specific waste-preventing requirement, but rather looking at whether the “*lease* is  
 25 *profitable*.” *Oil and Gas in a Nutshell*, 214 (6th ed. 2014) (emphasis added). That treatise further  
 26 cites to *Clifton v. Koontz*, 160 Tex. 82, 89 (1959), for the proposition that the inquiry must take into  
 27 account “all the circumstances.” *Contra* API Br. 6–7. Nor is it surprising that a different treatise on  
 28 which API relies, regarding “an Economic Analysis” of oil and gas conservation, API Br. 7, might  
 support its preferred *economic* definition of waste. But the primary definition of “waste” included in  
 a leading manual of oil and gas terminology is “the ultimate loss of oil or gas.” Howard R. Williams  
 & Charles J. Meyers, *Manual of Oil and Gas Terms* 1046 (14<sup>th</sup> ed. 2009); *see* AR84051.

regulators to impose costs on operators that exceeded the value of the gas saved.<sup>9</sup> The Mineral Leasing Act immediately followed Texas's adoption of a similar law in 1919. *See* 1919 Tex. Gen. Laws ch. 155; *see also* Tex. Const. art. XVI, § 59 (adopted 1917). Reviewing this history (and as though speaking directly to this case), a court had no problem concluding:

If the prevention of waste of natural resources such as gas is to await the time when direct and immediate profits can be realized from the operation, there would have been little need for the people of Texas to have amended their Constitution by declaring that the preservation and conservation of natural resources of the State are public rights and duties and directing that the Legislature pass such laws as may be appropriate thereto (Sec. 59a, Art. 16, Tex. Constitution, Vernon's Ann. St.), for private enterprise would not need the compulsion of law to conserve these resources if the practice were financially profitable.

*Railroad Comm'n of Tex. v. Flour Bluff Oil Corp.*, 219 S.W.2d 506, 508 (Tex. App. 1949). It was this understanding—that regulators needed to look out for the *public's* interest, not the private profits—that informed the Mineral Leasing Act's focus on the public interest.

BLM's and API's arguments do not support the proposition that historically a regulator could never impose a requirement to benefit the public merely because the private operator would not fully recoup the costs through gas savings, regardless of whether the well as a whole would remain profitable. BLM's attempt to disregard the public interest is an impermissible construction of the statute that fails to address the growing waste problem. *See Michigan*, 135 S. Ct. at 2707.

**C. BLM's selective application of its operator profit policy is arbitrary and capricious (Issue A-2).**

In its quest to achieve the predetermined result of rescinding provisions of the Waste Prevention Rule to which industry objected, BLM not only adopted a waste definition that violates Congress's intent, but it also failed to apply the definition in a "rational way." *Judulang v. Holder*, 565 U.S. 42, 55 (2011). BLM dismisses its new definition when it does not satisfy the agency's

<sup>9</sup> The only source that API cites that predates the Mineral Leasing Act is *Brewster*. API Br. 7. But BLM admits that “courts have not read the language in *Brewster* so broadly as to hold that the prudent operator standard can only be violated where a lessee refuses to engage in activity demanded by the lessor that will be profitable to the lessee.” BLM Br. 16. This undermines reliance on *Brewster* and the treatise providing this explanation to support the Rescission, regardless of whether BLM cited this specific part of the treatise in the Rescission. *Contra id.*

1 deregulatory goals, and ignores it with respect to the few provisions the Rescission retains. BLM’s  
 2 selective application of its new definition does not constitute reasoned decision making. *Michigan*,  
 3 135 S. Ct. at 2708 (“*Chevron* allows agencies to choose among competing reasonable interpretations  
 4 of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of  
 5 statutory context it likes while throwing away parts it does not.”); *California v. Azar*, 385 F. Supp.  
 6 3d 960, 1002 (N.D. Cal. 2019) (holding that a “permissible” interpretation under *Chevron* does not  
 7 insulate an agency from arbitrary and capricious review and the requirement to provide a “reasoned  
 8 analysis”). Indeed, such selective application is the “hallmark of arbitrary action.” *Nat’l Parks  
 9 Conservation Ass’n v. EPA*, 788 F.3d 1134, 1145 (9th Cir. 2015). And BLM cites to no case to  
 10 support its claim that deference is warranted where the agency fails to apply its definition uniformly.

11 BLM’s inconsistent application reflects the fact that the waste definition has “no operative  
 12 effective in the Rule.” BLM Br. 18 n.8. BLM concedes that “although [it] defines ‘waste of oil or  
 13 gas’ in the Revision Rule as a means of setting forth the agency’s policy, it does not actually use that  
 14 term in the operative provisions of the Rule.” BLM Br. 17 (citing AR14). In fact, BLM admits it  
 15 *could not* apply the policy as written because it does not specify a timeframe over which to make the  
 16 determination of profitability and different waste prevention measures will capture enough gas to  
 17 pay for themselves over different time periods. AR192 (BLM noting “it would be absurd to apply  
 18 the definition without taking into account a time frame”).

19 Fundamentally, BLM *only* applies the new policy when it suits its operator-centered,  
 20 deregulatory goals. When BLM’s new definition gets in the way of these goals, BLM ignores it.  
 21 Citizens Br. 10–11. Although the Waste Prevention Rule’s requirement that operators use low-bleed  
 22 pneumatic controllers results in compliance costs that are *less* than the monetary value of the  
 23 resources they are expected to conserve, BLM rescinds them anyway. *Id.* BLM concedes as much by  
 24 arguing that it eliminated the low-bleed requirement not to prevent waste, but because it expected  
 25 companies to voluntarily comply. BLM Br. 22. BLM argues that it is entitled to have “different  
 26 reasons for different aspects of its decision.” *Id.* But this reasoning impermissibly renders the Act’s  
 27 waste prevention mandate “superfluous.” *Fuentes v. Lynch*, 788 F.3d 1177, 1181 (9th Cir. 2015).  
 28 That is because, under BLM’s reasoning, where a requirement imposes costs that outweigh the gas

1 savings it is not “waste,” and when the gas savings outweigh the costs it will be “unnecessary in  
 2 light of the behavior of the regulated community.” BLM Br. 22. Under this interpretation of  
 3 convenience, there is nothing left for BLM to do.<sup>10</sup>

4       Contrary to BLM’s assertions, the agency arbitrarily ignores its new operator profit policy for  
 5 more than just “one specific provision.” BLM Br. 21. For example, BLM’s brief highlights that the  
 6 Rescission kept several Waste Prevention Rule provisions (those that mirrored the earlier regulatory  
 7 regime in NTL-4A) in place, such as imposing time and volume limits on royalty-free venting and  
 8 flaring. BLM Br. 20 (citing 43 C.F.R. § 3179.101–104). But BLM never analyzed whether these  
 9 requirements impose costs that outweigh the gas they save (or, indeed, whether they would save any  
 10 gas at all or only result in additional royalty payments). In fact, since BLM estimates that the  
 11 Rescission will reverse all of the gas savings accomplished by the Waste Prevention Rule, AR22, if  
 12 the agency’s supposed “notable improvements” on the NTL-4A entail *any* costs, they would seem to  
 13 flunk BLM’s operator profit test. BLM Br. 22. BLM’s arbitrary failure to apply its waste definition  
 14 uniformly shows that its only purpose is to justify the rescission of provisions to which industry  
 15 actors objected, and should be rejected.

16       **D.      BLM unlawfully abdicates the agency’s duty to prevent waste of public  
 17           resources based on a deficient analysis (Issue A-3).**

18       Based on a five-page summary devoid of any analysis, AR340–45, the Rescission cedes the  
 19 bulk of BLM’s authority over venting and flaring to a patchwork of different state regimes, so long  
 20 as those states have *any* program to limit venting and flaring, regardless of how stringent or  
 21 effective. *See* 43 C.F.R. § 3179.201. Blindly deferring to state standards without any assurance that  
 22 they will actually reduce wasteful venting and flaring violates Congress’s express mandate that  
 23 BLM—not the states—prevent waste of federal minerals. 30 U.S.C. § 225; *see Calvert Cliffs*

24  
 25       <sup>10</sup> Moreover, BLM does not support its assertion that wells that have not adopted low-bleed  
 26 pneumatic controllers have a functional need for high-bleed controllers, or are marginal wells where  
 27 low-bleed controllers might not be cost-effective. *See* AR88–89 (citing no evidence beyond agency’s  
 28 belief to support this conclusion), AR84125–26; *see also* BLM Br. 22. In fact, the record suggests  
 the opposite. It shows that Colorado, Wyoming, Utah, and California all require at least some use of  
 low-bleed controllers, including at marginal wells, without adverse consequences. AR84189–90.

1 *Coordinating Comm'n v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122–23 (D.C. Cir. 1971)  
 2 (striking down agency's "abdication" of its statutory duty because "[t]he only agency in a position to  
 3 make such a judgment is the agency . . . specifically directed" to consider the issue by Congress).

4 In a non-response, BLM points to two statutory provisions holding that the statute does not  
 5 interfere with states' rights to manage oil and gas within their borders. BLM Br. 23 (citing 30 U.S.C.  
 6 §§ 187, 189); *see* API Br. 18. But these provisions say nothing about *BLM's* obligation to prevent  
 7 waste of *federal* minerals. BLM does not explain how a patchwork of state rules can each constitute  
 8 "all reasonable precautions" to prevent waste of federal minerals. Citizens Br. 12; 30 U.S.C. § 225.

9 BLM also does not identify any "clear proof of legislative intent" to allow delegating its  
 10 authority to the states. *Assiniboine & Sioux Tribes of Ft. Peck Indian Res. v. Bd. of Oil & Gas*  
 11 *Conservation of Mont.*, 792 F.2d 782, 795 (9th Cir. 1986); *see also G.H. Daniels III & Assocs., Inc.*  
 12 *v. Perez*, 626 F. App'x 205, 212 (10th Cir. 2015) ("[D]elegations to outside parties are assumed to be  
 13 improper absent an affirmative showing of congressional authorization.") (citation omitted). Instead,  
 14 BLM argues, without citation, that it is properly "deferring" rather than improperly "delegating" to  
 15 the states. BLM Br. 23; API Br. 16–17. Allowing states to define what constitutes waste of federal  
 16 minerals without any minimum standards, however, is tantamount to delegating that authority to the  
 17 states, and carries the same risks, including "blur[red]" accountability," "undermining an important  
 18 democratic check on government decision-making." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 564–  
 19 65 (D.C. Cir. 2004); *see* *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 926 (D.C. Cir. 2008).<sup>11</sup>

20 BLM claims it lawfully deferred to state regulations when it "reconsidered state regulations  
 21 in light of its new definition of waste and asked whether existing state regulations adequately  
 22 prevent the loss of gas for which the value of the conserved gas outweighs the cost of capture." BLM  
 23 Br. 25. There is no record evidence to support this claim. *See* *NRDC v. EPA*, 857 F.3d 1030, 1040  
 24 (9th Cir. 2017) (dismissing an argument where agency provided not supporting record evidence).

25  
 26 <sup>11</sup> Just as in *Assiniboine*, BLM is providing a rubber stamp in advance for all venting and flaring,  
 27 regardless of the strength or efficacy of the state regulation, *contra* BLM Br. 23. *See* 43 C.F.R.  
 28 § 3179.201(a). Indeed, BLM has delegated more authority than in *Assiniboine*, where BLM at least  
*could* review state permitting decisions before rubber-stamping them. 792 F.2d at 793.

1 BLM’s five-page analysis does not even mention BLM’s waste definition, much less analyze  
 2 whether the state venting and flaring regulations meet this definition. AR340–45. Accordingly,  
 3 BLM’s post hoc claim in its brief provides no basis to support the Rescission. *See Cal. Pub. Utils.*  
 4 *Comm’n v. Fed. Energy Regulatory Comm’n*, 879 F.3d 966, 975 (9th Cir. 2018) (*Cal. PUC*). At best,  
 5 BLM’s post hoc rationale amounts to a claim that *any* state regulation, no matter the substance, is  
 6 presumptively sufficient to meet BLM’s definition of waste. This only highlights BLM’s complete  
 7 abdication of its duty to protect the public and take all reasonable precautions to prevent wasteful  
 8 practices like the rampant flaring of publicly owned gas.

9 BLM claims that the Rescission is similar to the Waste Prevention Rule’s variance provision,  
 10 and simply provides a “blanket variance” instead of case-by-case analysis. BLM Br. 24–25. But this  
 11 lack of case-by-case analysis also highlights BLM’s complete relinquishment of its Mineral Leasing  
 12 Act waste-prevention duty. The Waste Prevention Rule’s variance provision set a federal floor  
 13 requiring states to show their regulations would “perform at least equally well in terms of reducing  
 14 waste of oil and gas,” and “reducing environmental impacts from venting and or flaring of gas.”  
 15 AR990 (43 C.F.R. § 3179.401(a)(2)(iv) (2016)). Likewise, the NTL-4A only permitted deferral *after*  
 16 a case-by-case analysis of state standards, *see* AR3010, and, at any rate, neither BLM nor API point  
 17 to any instance in which BLM did ratify a state standard under the NTL-4A. The Rescission, by  
 18 contrast, provides a blanket variance to all states based on the mere *existence* of standards no matter  
 19 their stringency. *See* 43 C.F.R. § 3179.201. BLM claims that this merely “shifts the burden to BLM”  
 20 to deny insufficient state rules. BLM Br. 25. But there is no mechanism in the Rescission for BLM  
 21 to do so and therefore BLM would have to undertake a rulemaking to reject a state standard. The  
 22 Rescission is unlawful because BLM has abdicated its statutory duty to prevent waste to the states.

23 **E. BLM fails to explain its changed position with respect to the need for the Waste  
 24 Prevention Rule and its definition of waste (Issue A-4).**

25 BLM did not adequately justify its dramatic change in position under the standards of *FCC v.*  
 26 *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). While BLM’s lawyers now acknowledge  
 27 the agency’s obligation to safeguard the public welfare, BLM Br. 19, there is no mention of this  
 28 obligation in the Rescission. *See Cal. PUC*, 879 F.3d at 975 (courts do not defer to post hoc  
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1 rationalizations of counsel). As explained *supra* pp. 2–3, BLM defined the waste prevention  
 2 measures in the Waste Prevention Rule based on the “fundamental principle that the public should  
 3 benefit from mineral production on public lands,” AR920, and expressly relied on the Mineral  
 4 Leasing Act’s mandate to “safeguard[] . . . the public welfare,” AR921 (quoting 30 U.S.C. § 187). In  
 5 the Rescission—perhaps recognizing the impossibility of the task—BLM fails to square its new  
 6 waste definition with its mandate to protect the public welfare, in violation of the APA. *Citizens Br.*  
 7 8; *Fox Television*, 556 U.S. at 515 (requiring agency to demonstrate any change in position is  
 8 “permissible under the statute”); *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1073 (9th Cir.  
 9 2018) (recognizing that agency must consider the Endangered Species Act’s policy of  
 10 “institutionalized caution” when changing position). BLM’s response fails to address this change in  
 11 position argument. Indeed, BLM’s post hoc claim that the Rescission serves the public interest only  
 12 serves to highlight that it did not even acknowledge its change in position. BLM Br. 19. BLM’s post  
 13 hoc claim also is flatly wrong. *See supra* pp. 8–10 (explaining the fallacy of BLM’s claim that the  
 14 Rescission safeguards the public welfare by protecting operators’ investments, promoting mineral  
 15 development, and generating a fair return for the public).

16 BLM also fails to address its changed position with respect to whether there was a need to  
 17 curb venting, flaring and leaks. *Citizens Br.* 14–15. After a thorough administrative process and  
 18 based on an extensive record, BLM documented a significant problem of wasted public gas. BLM  
 19 found that since 1979, oil and gas production had increased dramatically, that between 2009 and  
 20 2015, total reported flaring from federal and Indian wells increased by over 1,000%, and operators  
 21 vented or flared enough gas to supply 6.2 million households for a year. AR915–16. The  
 22 Government Accountability Office (GAO) also raised concerns about excessive venting and flaring.  
 23 *Citizens Br.* 14. In rescinding these rules, BLM largely ignored these factual conclusions. *Organized*  
 24 *Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (*en banc*) (requiring  
 25 “reasoned explanation” for disregarding prior factual findings); *California v. U.S. Dep’t of the*  
 26 *Interior*, 381 F. Supp. 3d 1153, 1166–71 (N.D. Cal. 2019).

27 BLM’s principal response is to point to its new (unlawful) waste definition. BLM Br. 31–32.  
 28 But as discussed *supra* pp. 4–13, this definition is not “permissible under the statute.” *Fox*  
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1 *Television*, 556 U.S. at 515. BLM also disingenuously attempts to claim that it has addressed all of  
 2 GAO’s concerns. BLM Br. 31–32. There is one glaring omission: its failure to do *anything* to curb  
 3 venting, flaring, or leaks. BLM points to a 2019 GAO Report to support its claim, but fails to  
 4 acknowledge that the GAO expressly found that the Rescission would “adversely affect . . . efforts to  
 5 implement [its] recommendations.” Ex. A to Dellinger Decl. 104-05, ECF 110-4 (June 20, 2019).  
 6 BLM’s failure to adequately explain its decision to abdicate its responsibility to protect the public  
 7 from the harms of venting, flaring, and leaks violates the APA.

8 **II. BLM’s “Burden” Justification, Including Its Cost-Benefit Analysis, Is Not Supported  
 9 by the Record and Is Deeply Flawed (Issues B & C).**

10 BLM does not dispute that it determined that the Waste Prevention Rule posed an “undue  
 11 burden” on operators well before it proposed the Rescission or performed its new analysis of  
 12 supposed per-well costs for marginal wells. *See* Citizens Br. 15–16. Nor does BLM dispute that it  
 13 determined that the Rescission would only affect average profit margins for small companies by  
 14 0.19% and, like the Waste Prevention Rule, would not have a significant impact on the price or  
 15 supply of energy or on jobs. *See* BLM Br. 44–45; AR23–24. Yet BLM seeks to justify the  
 16 Rescission on a claim that the Waste Prevention Rule imposed unnecessary burdens on energy  
 17 production, including because its costs exceeded its benefits. AR1. In doing so, BLM relies entirely  
 18 on its last-minute marginal well analysis and “interim” estimate for the social cost of methane. BLM  
 19 now concedes numerous significant flaws with both analyses, but urges the Court to disregard these  
 20 errors by asserting repeatedly that the Court should blindly accept its “burden” justification. *E.g.*,  
 21 BLM Br. 31–32, 38, 42. This stretches the rule of deference far past its breaking point. *See Brower*,  
 22 257 F.3d at 1067 (deference “not unlimited”). BLM’s burden justification is not entitled to deference  
 23 because it is not supported by the record, is contingent on a procedurally and substantively deficient  
 24 analysis of marginal well impacts, and relies on an artificial evaluation that over counts the costs and  
 25 undervalues the benefits of the Waste Prevention Rule.

1        **A.     BLM’s “burden” justification is not supported by the record (Issue B-1).**

2        BLM’s justification that the Rescission is necessary to relieve regulatory burdens that  
 3 “unnecessarily encumber energy production, constrain economic growth, and prevent job creation”  
 4 “runs counter” to the conclusions BLM reaches in the Rescission itself, including that the Rescission  
 5 will decrease natural gas production and will not have a significant impact on small operator profits,  
 6 energy prices, or jobs. *See* Citizens Br. 15–16; *State Farm*, 463 U.S. at 43; *Earth Island Inst. v. U.S.*  
 7 *Forest Serv.*, 442 F.3d 1147, 1160 (9th Cir. 2006) (*Earth Island*) (rejecting agency justification  
 8 where it was not a “reasoned decision based on [the agency’s] evaluation of the evidence”).

9        With respect to BLM’s conclusion that the Waste Prevention Rule would “unnecessarily  
 10 encumber energy production,” BLM states that the Rescission is expected to “influence” production.  
 11 BLM Br. 45. But it fails to mention that BLM’s own analysis shows that the Rescission—not the  
 12 Waste Prevention Rule—encumbers natural gas production, reducing it by 299 billion cubic feet.  
 13 Likewise, with respect to job creation, BLM admits that the Rescission will not substantially  
 14 “alter the investment or employment decisions of firms,” but that “there *may* be a small positive  
 15 impact on investment and employment due to the reduction in compliance burdens *if* the output  
 16 effects dominate.” BLM Br. 45 (quoting AR99) (emphases added). This conditional assertion is not  
 17 only unsupported by the record, but also a far cry from the Rescission’s alleged rationale of  
 18 removing regulations that “constrain economic growth[] and prevent job creation.” AR1.<sup>12</sup>

19        BLM concedes that it found these impacts would not be significant, but argues that they are  
 20 irrelevant because BLM made these findings in support of *other* legal mandates, principally the  
 21 Regulatory Flexibility Act. BLM Br. 44; W. Energy All. & Indep. Petrol. Ass’n of Am.’s Cross Mot.

22  
 23  
 24        <sup>12</sup> BLM argues that if the Rescission cannot be justified as removing unnecessary regulatory burdens  
 25 because it has “insignificant effects” on energy production, investment, and jobs, the benefits of the  
 26 Waste Prevention Rule are “equally overblown.” BLM Br. 45. But the purpose of the Waste  
 27 Prevention Rule was not to significantly spur production, investment, or jobs—it was to *reduce*  
 28 *waste* of publicly owned resources, something that it did in spades. Citizens Br. 2. There is nothing  
 inconsistent about saying that rescinding a rule that significantly reduced waste at a low cost  
 increases that waste without providing any significant financial benefit.

1 for Summ. J. 12, ECF 127 (Aug. 26, 2019) (WEA Br.).<sup>13</sup> This defies reason. An agency cannot say  
 2 that “the average reduction in compliance costs associated with [the Rescission] are a small enough  
 3 percentage of the profit margin for small entities [0.19%] so as not to be considered ‘significant,’”  
 4 AR23–24, while at the same time largely justify rescinding important waste prevention requirements  
 5 because they allegedly impose an undue economic burden on small entities. This Court rejected that  
 6 precise argument when BLM advanced it in support of its earlier attempt to suspend the Waste  
 7 Prevention Rule:

8 BLM does not explain how or why it could conclude that the calculated costs could be  
 9 so insignificant as not to unnecessarily or disproportionately burden small entities  
 10 within the meaning of the [Regulatory Flexibility Act], and simultaneously conclude  
 11 that there would be a disproportionate effect for other purposes. Nor could it, as these  
 12 two positions are *entirely inconsistent*.

13 *California v. BLM*, 286 F. Supp. 3d 1054, 1066 (N.D. Cal. 2018) (emphasis added). The same  
 14 analysis applies here. BLM also asserts that \$72,000 in cost savings *per operator* per year may  
 15 provide some “relief to small operators.” BLM Br. 45. But this \$72,000 estimate corresponds to the  
 16 change in average profit margins for small companies of 0.19%—the same change that the agency  
 17 concedes is not significant. BLM did not identify any record evidence to the contrary.<sup>14</sup>

18 Lacking any evidence of significant impacts on operators’ bottom lines, the price or supply  
 19 of energy, or employment, BLM retreats to an argument that the Rescission will have some “positive  
 20 effect on marginal wells.” BLM Br. 45 (quoting AR22, 91). But an impact on marginal wells does  
 21 not support BLM’s claim that the Waste Prevention Rule will burden oil and gas operators writ  
 22 large. Over time, oil and gas wells experience production declines and become “marginal” and,  
 23 depending on the price of oil and gas and the costs of operating the well, operators will eventually

24 <sup>13</sup> Industry’s standing argument is a red herring. WEA Br. 14–16. Plaintiffs allege that the Rescission  
 25 is arbitrary and capricious under the APA, not that BLM violated the Regulatory Flexibility Act.  
 26 Citizen Groups’ Compl. 40–42 (Sept. 28, 2018).

27 <sup>14</sup> In the Rescission’s Regulatory Impact Analysis, BLM describes a number of factors that may  
 28 make this impact slightly higher for certain companies, though ultimately reaffirms its conclusion  
 29 that, even for these companies, impacts on profits are “unlikely to achieve the level of being  
 30 significant.” AR100.

1 make a decision to “shut in” the wells until market conditions improve. AR953, 84086–87. Large  
 2 operators who earn tens of millions of dollars in annual revenue own most marginal wells. *See*  
 3 AR96431 (operators with over 100 BLM-managed wells own 75% (43,788 of the total 58,120) of  
 4 BLM-managed marginal wells, and they *each* earn on average up to \$347 million annually from  
 5 their BLM-managed wells). BLM did not explain how the modest compliance costs associated with  
 6 the Waste Prevention Rule would burden any operator, let alone these large operators. Indeed, states  
 7 with regulations similar to the Rule that apply to marginal wells, like Colorado, have robust oil and  
 8 gas development. *See supra* p. 10. In the end, BLM cannot justify the Rescission on the basis that it  
 9 encumbers energy production, constrains economic growth, and prevents job creation.

10 **B. BLM’s last-minute, flawed marginal well analysis does not justify the Rescission  
 11 (Issue B-2).**

12 The centerpiece of BLM’s “burdens” justification for the Rescission is that the Waste  
 13 Prevention Rule imposed undue costs on marginal wells, which is based entirely on a flawed  
 14 analysis that BLM prepared after-the-fact and was never released for public comment. Citizens Br.  
 15 16–21. Because BLM violated the APA by failing to allow for public comment on the analysis, this  
 16 Court should disregard it. If the Court does consider the analysis, it reject it as fatally flawed.

17 1. *BLM deprived the public of the opportunity to comment on the only evidence  
 18 allegedly supporting BLM’s finding that the Rule unduly burdened marginal  
 wells (Issue B-2a).*

19 BLM concedes that it developed the marginal well analysis after it had already concluded  
 20 that the Waste Prevention Rule burdens operators. BLM Br. 37 (noting that it completed the  
 21 marginal well analysis after the proposed Rescission). As such, BLM did not release its marginal  
 22 well analysis for public comment, and indeed did not even make it public with the final Rescission,  
 23 instead only grudgingly releasing it as part of the administrative record negotiation in this litigation.  
 24 Citizens Br. 17. This violates BLM’s obligation to “disclose . . . the data” on which the Rescission is  
 25 based. *California v. U.S. Dep’t of Interior*, 381 F. Supp. 3d at 1173; *see Idaho Farm Bureau Fed’n v.  
 26 Babbitt*, 58 F.3d 1392, 1402–04 (9th Cir. 1995) (rejecting agency’s failure to provide critical  
 27 information for public review).

1 BLM’s chief defense is to downplay the importance of the analysis by arguing that it is  
 2 merely “one specific set of data,” providing only an “upper limit” that was not “essential” for the  
 3 Rescission and therefore did not prejudice Plaintiffs. BLM Br. 28, 36–37. As demonstrated by both  
 4 the record and BLM’s brief, however, the new analysis is a foundational rationale for the Rescission.  
 5 *See* AR2; BLM Br. 27. BLM “cannot have it both ways”—saying the analysis is unimportant when  
 6 addressing its blatant notice violation while at the same time relying on it significantly to justify the  
 7 Rescission. *General Chem. Corp. v. United States*, 817 F.2d 844, 846, 854 (D.C. Cir. 1987).

8 Because the new marginal well analysis is “unique information” that is “central” to BLM’s  
 9 conclusion that the Waste Prevention Rule burdened marginal wells, BLM was required to make it  
 10 available for public comment. *Idaho Farm Bureau Fed’n*, 58 F.3d at 1402–04. The proposed  
 11 Rescission provided no data to support BLM’s allegations about the Waste Prevention Rule’s  
 12 impacts on marginal wells. AR84085. Indeed, far from simply supporting BLM’s “prior  
 13 calculations,” BLM Br. 37, BLM’s new analysis is the *only* data BLM cites in support of its  
 14 conclusion that the Waste Prevention Rule imposed disproportionate burdens on marginal wells.  
 15 BLM Br. 27; AR4; *see also* WEA Br. 10 (explaining that the “additional information on marginal  
 16 wells” is one of the “critical aspects of the new administrative record and analysis”).

17 Moreover, contrary to BLM’s claims, BLM’s failure to make this critical analysis public *did*  
 18 prejudice the Citizen Groups. BLM ignores the Citizen Groups’ extensive critique of the analysis  
 19 provided to this Court. Citizens Br. 18 n.9; Decl. of Rosalie Winn, ECF No. 109.2 ¶¶ 9–10 (June 7,  
 20 2019). Had the Citizen Groups been able to provide this critique to BLM during the rulemaking,  
 21 BLM would have been required to respond and consider that information as part of its final decision.  
 22 *See California v. U.S. Dep’t of Interior*, 381 F. Supp. 3d at 1172 (“Among the purposes of the  
 23 APA’s notice and comment requirements [is] . . . to give affected parties an opportunity to develop  
 24 evidence in the record to support their objections to the rule and thereby enhance the quality of  
 25 judicial review.” (quoting *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011)).  
 26 Industry’s argument that the Citizen Groups’ critique is “extra-record” only underscores why by  
 27 BLM’s failure to make its analysis available for public comment prejudices the Citizen Groups.  
 28 WEA Br. 16.

2. *BLM's post hoc explanations cannot save its flawed marginal well analysis (Issue B-2b).*

Had the marginal wells analysis been available for public comment, the Citizen Groups would have demonstrated to BLM that it double counts costs, relies on a misleading timeframe, and is founded on unsupported assertions rather than actual data. Citizens Br. 18–20. BLM’s flawed analysis is entitled to no deference. *See Earth Island*, 442 F.3d at 1166 (rejecting agency’s “extremely misleading” analysis).

For the first time forced to defend its marginal well analysis from public scrutiny, BLM’s response brief adds several post hoc caveats to the analysis, saying that its per-well calculations are only a “potential” revenue reduction and conceding that the data in the Rescission represent the “upper limit of the 2016 Rule’s potential impact” on marginal wells. BLM Br. 28. Neither “potential” nor “upper limit” appear in the Rescission itself. AR1 (requirements of the Waste Prevention Rule “*would have* constituted 24 percent of an operator’s annual revenues from even the highest-producing marginal oil wells and 86 percent of an operator’s annual revenues from the highest-producing marginal gas wells” (emphasis added)); *see also* AR4, 22 (describing marginal well analysis and claiming that it shows “many marginal wells” could be impacted and “many applications for exemptions . . . would have been warranted”). Indeed, in severe tension with BLM’s response, the Rescission claimed these estimates were conservative. AR1 (stating numbers were true for “even the highest-producing marginal oil wells”). BLM’s post hoc explanations must be rejected. *See Cal. PUC*, 879 F.3d at 975; *Humane Soc’y of the U.S. v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010) (“Defendants’ post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself.”).

Moreover, even if these post hoc caveats were not enough to make the analysis unlawfully misleading, there are still glaring holes in BLM’s marginal well analysis. *Tripoli Rocketry Ass’n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006); *Coburn v. McHugh*, 679 F. 3d 924, 926, 934 (D.C. Cir. 2012) (where an agency’s supposedly scientific “decisions are largely incomprehensible . . . they are unworthy of any deference”). BLM’s marginal well analysis consists of one spreadsheet, AR180479, that does not explain key assumptions or the Citizen Groups’ Opposition to Cross-Motions and Reply in Support of Motion for Summary Judgment, Case No. 4:18-cv-05712-YGR (Consolidated with No. 4:18-cv-05984-YGR)

1 source of key data, including the “total cost” figures used to support BLM’s claim that the Waste  
 2 Prevention Rule would have “cost marginal oil wells over 24%, and marginal gas wells over 86%, of  
 3 their annual revenue.” BLM Br. 27 (citing AR2, 4).

4 For example, BLM does not dispute that it included the cost of installing plunger lifts (a  
 5 technique to reduce emissions from liquids unloading) in its assessment of compliance costs for  
 6 *every* marginal gas well. BLM Br. 28; *see* Citizens Br. 19. But BLM claims it did so to determine the  
 7 “upper limit” of total costs, despite recognizing that it is possible *no wells at all* would have incurred  
 8 these costs. BLM Br. 28; AR70. BLM’s artificial inflation of plunger lift costs matters because  
 9 plunger lifts are among the Waste Prevention Rule’s most significant expenses for an individual gas  
 10 well, accounting for 54% of the total annualized per-well costs included in BLM’s marginal well  
 11 analysis. AR180479.<sup>15</sup>

12 Similarly, BLM’s marginal well analysis misleadingly compared *total* costs (that are spread  
 13 over ten years) to one year of revenue. Citizens Br. 19. BLM attempts to paper over this deception  
 14 by arguing that the Citizen Groups are merely dissatisfied with how BLM “expressed these  
 15 concepts” and where it included information. BLM Br. 28–29. But how BLM presented this  
 16 information matters: throughout the Rescission, BLM incorrectly refers to its marginal well cost  
 17 analysis as being based on “annual compliance costs.” *See, e.g.*, AR1, 2, 22. BLM buried the data  
 18 contradicting that claim in its Regulatory Impact Analysis (RIA). AR103. When BLM assessed  
 19 impacts of marginal well based on *annualized* compliance costs, they were are an order of magnitude  
 20

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21<sup>15</sup> WEA’s assertion that the plunger lift costs account for a “minor portion” (3%) of the Waste  
 22 Prevention Rule’s compliance costs, WEA Br. 17, perfectly illustrates the illegality of BLM’s  
 23 marginal well analysis. WEA’s claim is based on BLM’s assessment of the Waste Prevention Rule’s  
 24 impacts across the *entire* oil and gas industry, not BLM’s data on costs to *individual* marginal wells  
 25 at issue here. *Compare* AR90 (assessing Rule’s total compliance costs), *with* AR180479 (assessing  
 26 costs at individual marginal wells). BLM took costs that it had elsewhere identified as small or non-  
 27 existent (and WEA concedes are “minor”) in part because they do not apply to most wells and  
 28 applied those costs to all natural gas wells in an effort to inflate supposed per-well costs. WEA’s  
 argument simply underscores the discrepancy between BLM’s evaluation of industry-wide costs,  
 which it admits are minimal, and its new assessment of costs at individual marginal wells, and the  
 degree to which the latter is divorced from the underlying record. Indeed, BLM’s marginal well  
 analysis similarly applies the costs of other requirements to all wells where BLM’s analysis  
 elsewhere recognizes that they will only apply at a subset of sources. Citizens Br. 18 n.10.

1 lower than when BLM compared annual revenues with *total* compliance costs. Citizens Br. 19  
 2 (citing AR180479). For the first time in its brief, BLM claims that even the annualized figures are  
 3 “significant” for operators’ decisions about whether to shut in marginal wells. BLM Br. 29. But there  
 4 is no evidence in the record to support this post hoc claim, *see Cal. PUC*, 879 F.3d at 975, and it  
 5 does not account for the many other serious flaws with BLM’s marginal well analysis.

6 Finally, the Rescission relies on BLM’s conclusion that marginal wells will “shut in” due to  
 7 the costs of complying with the Waste Prevention Rule. Citizens Br. 19–20. BLM has recognized  
 8 that operators frequently shut in wells based on market conditions, in particular the price of oil and  
 9 gas. AR953, 84086–87. In any event, BLM points to no evidence to support its new finding that the  
 10 Waste Prevention Rule did not sufficiently address the risk of shut in due to compliance costs.  
 11 AR105. In fact, the Waste Prevention Rule had exemptions from nearly every provision if they  
 12 would cause shut ins. *See, e.g.*, AR912–13. Refusing to employ the exemption process and without  
 13 providing any analysis or evidence, BLM decided that complying with the Waste Prevention Rule  
 14 “could” have led “the *lowest-producing* marginal well operators” to shut in their wells, rather than  
 15 applying for the exemptions. BLM Br. 29 (citing AR4–5, 105) (emphases added). BLM did not  
 16 estimate how many operators would make this decision, or how difficult it would be for them to gain  
 17 exemptions, which BLM itself was in charge of authorizing. *See Pac. Coast Fed’n of Fishermen’s*  
 18 *Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091–92 (holding that agency’s conclusions  
 19 must be explained and supported; the court cannot just take the agency’s word for it).<sup>16</sup> Accordingly,  
 20 BLM’s claim of premature abandonment is overbroad and unsupported.<sup>17</sup>

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23<sup>16</sup> BLM claims that there was no guidance under the Waste Prevention Rule for determining when  
 24 compliance costs would cause the operator to “abandon significant recoverable reserves,” the  
 25 standard the Rule applied to obtain an exemption. BLM Br. 27. As discussed *supra* pp. 11–12,  
 26 however, this is the same standard that BLM had been applying for nearly forty years under NTL-  
 27 4A. BLM also objects that the Waste Prevention Rule did not allow for a “full exemption” from leak  
 28 detection and repair requirements, *id.*, but the Rule did allow operators to design an alternate  
 schedule if necessary to prevent abandonment of significant underground reserves. AR931.

29<sup>17</sup> Notably, BLM’s first reason for its unlawful cost-benefit analysis, BLM Br. 38, is that its “waste  
 30 definition” means it cannot consider societal benefits, belying its claim that its “waste” and  
 31 “burdens” definitions “provide two independent grounds” for the Rescission. BLM Br. 44 n.20.  
 32 Citizen Groups’ Opposition to Cross-Motions and Reply in Support of Motion for Summary  
 33 Judgment, Case No. 4:18-cv-05712-YGR (Consolidated with No. 4:18-cv-05984-YGR)

1           3.     *BLM's marginal well analysis does not support its blanket Rescission (Issue*  
 2           *B-2c).*

3           At the same time it focuses on impacts to the “lowest-producing marginal well operators,”  
 4 BLM Br. 29, BLM attempts to defend its decision to exempt *all* operators from *all* of the Waste  
 5 Prevention Rule’s provisions designed to prevent waste of public resources. That decision is  
 6 overbroad and arbitrary. *California v. BLM*, 286 F. Supp. 3d at 1066–67 (concluding that BLM did  
 7 not properly tailor its attempt to suspend the Waste Prevention Rule when it relied on burdens to  
 8 small operators to stay waste-preventing measures at all wells). BLM’s claims of “potential” and  
 9 “upper-limit” harms to marginal wells (and specifically the lowest-producing marginal wells) cannot  
 10 serve as a basis to rescind the Waste Prevention Rule for all oil and gas wells. BLM Br. 28–29.

11           BLM’s claim that it did “tailor” the Rescission, *id.* at 28, is flatly incorrect: the Rescission  
 12 applies to all federal and Indian oil and gas wells. BLM responds that the *majority* of wells it  
 13 manages are allegedly marginal. *Id.* But BLM fails to account for the fact that tens of thousands of  
 14 wells do not qualify as marginal wells and, even for those that do, many are owned by large,  
 15 profitable companies and are not the “lowest producing wells.” BLM did not tailor the Rescission  
 16 because it allows all of these wells to continue wasting publicly owned gas, even though BLM does  
 17 not now (and has never) claimed they are burdened by capturing that gas. Citizens Br. 20–21.  
 18 BLM’s failure to consider a more narrowly tailored rule is simply more evidence of its single-  
 19 minded focus on rescinding waste prevention provisions to which oil and gas operators objected.

20           C.     **BLM cannot save its unsupported “burden” justification by pointing to its**  
 21           **flawed cost-benefit analysis (Issue C).**

22           In its brief, BLM tries to save its fundamentally flawed burdens justification by equating its  
 23 “conclusion that the [Waste Prevention] Rule would unduly burden operators” with its determination  
 24 that that Rule’s “costs outweighed its benefits.” BLM Br. 44. But BLM’s cost-benefit justification is  
 25 just as arbitrary as its burdens justification. BLM’s cost-benefit analysis relies on a flawed “interim”  
 26 social cost of methane, refuses to consider the environmental and health costs of the Rescission, and  
 27 intentionally overstates the Waste Prevention Rule’s compliance costs. Citizens Br. 21–26.

1. *BLM cannot rely on its “interim” social cost of methane (Issue C-1).*

To justify the Rescission, BLM cooked the books by creating a new “interim” estimate of the social cost of methane that purportedly considers only select domestic impacts, rejecting actual science-based estimates and reducing the Rescission’s acknowledged climate impacts by up to 96%. AR84090. BLM defends its use of the shoddy “interim” estimate with a series of contradictions. BLM argues both that it made a “policy” choice to use the “interim” estimate, BLM Br. 38, and an “expert” determination, *id.* at 42. It also alternates between arguing that this Court must ignore the scientific and technical evidence underpinning the interagency social cost of methane because the technical support documents supporting it were “withdrawn,” *id.* at 40, while simultaneously asking the Court to accept those same technical support documents as the basis of its flawed “interim” estimate, *id.* at 43. And while the agency continues to claim that it will update its interim estimate based on 2017 recommendations from the National Academy of Sciences, *id.* at 42, it has no satisfactory answer for why it continues to rely on an estimate that is thoroughly undermined by the National Academy’s conclusions. The “interim” social cost is neither interim nor the work of an expert agency trying to do its best in the face of “uncertainty,” as BLM claims. *Id.* at 42–44. It is a slapdash estimate put together in a matter of months over two years ago (and not revisited since) solely to justify deregulatory actions. Citizens Br. 21–24.<sup>18</sup>

Fundamentally, BLM cannot claim that it is using the “best available” metric to determine the costs of methane pollution. BLM Br. 42. BLM admits that it rejected an estimate that an interagency team of experts developed through years of public comment and peer review for one that was developed in months without *any* public comment or peer review. *Compare* AR21861–81, 21882–901, 21902–52, and 21953–22003 (thorough explanation of process and basis for interagency estimate), *with* AR128–33 (six pages of explanation for “interim” estimate, leading with a hollow promise to update it later). Contrary to BLM’s suggestion, “specialists” are *not* “express[ing]

<sup>18</sup> BLM’s failure to identify any evidence of progress in updating the “interim” estimate speaks volumes. *See* BLM Br. 42. Although the interagency effort was a “years-long process,” *id.* at 42 n.16, that process was not secret—indeed, it involved several rounds of public comment and expert peer review. *See id.* (citing the AR). BLM identifies no such processes underway here.

1 conflicting views,” and there are *not* multiple “available scientific models.” BLM Br. 43. BLM has  
 2 decided for policy reasons that it prefers a lower estimate and then deployed a completely non-  
 3 scientific methodology to get there. BLM’s reliance—for years, while it promises to do better later—  
 4 on a methodology that bears none of the indicators of reliability, omits key *domestic* costs, and is  
 5 undermined by the record before it is not entitled to deference. Citizens Br. 21–24.

6 BLM is incorrect that its “interim” metric is consistent with the recommendations of the  
 7 National Academies of Science. BLM Br. 41. In fact, the National Academies concluded that “an  
 8 accurate assessment of domestic-only impacts is *not possible* using the existing integrated  
 9 assessment model methodologies [i.e., the ones BLM relied on here] because they are designed to  
 10 produce global estimates and do not model all relevant interactions among regions.” Citizens Br. 22  
 11 (citing AR22770–72). BLM attempts to downplay the conflict between the National Academies’  
 12 report and its “interim” estimate, arguing that the report stated that domestic estimates were “feasible  
 13 in principle.” BLM Br. 41. But BLM omits the end of that sentence, which says the domestic  
 14 approach is “limited in practice” by existing methodologies. AR22772. Specifically, the report notes  
 15 that the interagency group recognized that domestic estimates for the social cost of methane were  
 16 “approximate, provisional, and highly speculative,” and that “[c]orrectly calculating” the domestic  
 17 social cost requires more than considering direct impacts on American soil, because “[c]limate  
 18 damages to the United States cannot be accurately characterized without accounting for  
 19 consequences outside U.S. borders.” AR22771–72. But BLM’s interim estimate has done precisely  
 20 what the National Academies warned against—it has created a “speculative” estimate that overlooks  
 21 the full suite of climate harms that the U.S. will experience due to methane pollution. *See Ctr. for*  
 22 *Biological Diversity v. Zinke*, 900 F.3d 1053, 1068 (9th Cir. 2018) (although an agency has  
 23 discretion to rely on expert opinions of its choosing “it cannot ignore available . . . data”); *Greater*  
 24 *Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011) (agency cannot ignore  
 25 evidence “pointing in the opposite direction” from its conclusions).

26 The cases BLM cites are not to the contrary. BLM Br. 42–43. For example, *Lands Council v.*  
 27 *Martin*, 529 F.3d 1219, 1226 (9th Cir. 2008), involved a methodology verified through “field testing  
 28 and practical experience,” rather than verified through peer-review or formal publication. But here,  
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1 BLM has disregarded an estimate verified through peer-review for a new interim estimate that has  
 2 *not* been verified by any method—peer-review or otherwise. *Id.*

3 Moreover, although the “interim” estimate purports to “focus on benefits and costs that  
 4 accrue to citizens and residents of the United States,” BLM Br. 40, this ignores that climate change  
 5 impacts outside the U.S.—including geopolitical security, “economic and political destabilization,”  
 6 “global migration,” effects on multinational companies, and impacts to U.S. citizens living abroad—  
 7 have real impacts on U.S. interests. Citizens Br. 22; ECF No. 115.1 at 12–17; AR84177–86. BLM’s  
 8 only response is to disparage these impacts as too far afield. BLM Br. 38, 41 n.15. But the  
 9 interagency estimate took these spillover effects into account, and these impacts *do* affect  
 10 Americans. Impacts to “U.S. citizens abroad” are effects that “accrue to citizens . . . of the United  
 11 States.” BLM Br. 40. BLM’s inconsistent approach is “irrational.” *Servheen*, 665 F.3d at 1027.<sup>19</sup>

12 Ultimately, BLM’s sole basis for its “policy choice” of the “interim” estimate is that the  
 13 technical support documents underlying the interagency social cost were withdrawn by Executive  
 14 Order 13783, which directs BLM to make its cost-benefit analysis consistent with Office of  
 15 Management and Budget (OMB) Circular A-4. BLM Br. 38, 40.<sup>20</sup> BLM wrongly claims there is “no  
 16 conflict” between relying on the withdrawn interagency materials for some aspects of its analysis as  
 17 the “best available Federal agency estimates of social costs” and disregarding the interagency  
 18 conclusions elsewhere. BLM Br. 43 n.18 (admitting it relied on the interagency inputs and  
 19 modeling). BLM “cannot have it both ways” by citing evidence as supportive of one conclusion, but  
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21 <sup>19</sup> BLM is wrong to characterize amicus Institute for Policy Integrity’s (IPI) brief as principally  
 22 “press[ing] for a global metric.” BLM Br. 40. In fact, IPI’s principal argument is that BLM’s  
 23 “interim” metric is faulty because it ignores significant effects that fall to U.S. citizens, is tied  
 24 bizarrely to the relative coastline length of the United States versus the European Union, and is  
 inconsistent because BLM counts cost savings that will accrue to foreign entities. Brief of IPI as  
 Amicus Curiae 12–17, ECF 115.1 (June 21, 2019). BLM offers no response to these points.

25 <sup>20</sup> BLM is wrong that another court in this district upheld the interim estimate “on the same  
 26 grounds.” BLM Br. 40. The *California v. BLM* court found that Executive Order 13,783 and OMB  
 27 Circular A-4 provided a basis for BLM’s change in position to consider domestic, rather than global,  
 28 impacts. 286 F. Supp. 3d at 1070. But that court did not consider the issue here: whether BLM’s use  
 of the interim estimate is arbitrary and capricious because it is not supported by a scientific and  
 economic record. *See State Farm*, 463 U.S. at 43–44.

1 disregarding the same evidence when making another finding. *General Chem. Corp.*, 817 F.2d at  
 2 854; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 901 (D. Ore.  
 3 2016) (similar). Regardless, the policy directives in Executive Order 13,783 and OMB Circular A-4,  
 4 including the directive to consider domestic costs, cannot override the scientific and economic  
 5 reality that provided the foundation for the interagency estimate, or absolve BLM of its  
 6 responsibility under the APA to conduct reasoned decision making. Citizens Br. 23.

7           2.       *BLM ignores the Rescission's other health and safety costs (Issue C-2).*

8           Confirming BLM's focus on operator's bottom lines at the expense of the public, *see supra*  
 9 pp. 3–4, BLM arbitrarily put its thumb on the scale by giving no weight to the air pollution harms  
 10 associated with its action. Citizens Br. 24–25. BLM admits that it did not quantify these negative  
 11 impacts to public health and safety, but it does not argue that such analysis is not possible. BLM Br.  
 12 48. Instead, BLM argues that it is not “legally required” to do so. *Id.* This claim is contrary to Ninth  
 13 Circuit law. *See Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1203 (9th Cir. 2008) (*CBD*  
 14 v. *NHTSA*) (requiring agency to monetize climate pollution harms).<sup>21</sup> Moreover, even if BLM were  
 15 not required to perform a cost-benefit analysis, it is the very definition of arbitrary for an agency to  
 16 justify an action by considering only its benefits while ignoring its costs. *See id.* at 1198 (an agency  
 17 doing a cost-benefit analysis “cannot put a thumb on the scale by undervaluing the benefits and  
 18 overvaluing the costs of more stringent standards”); *High Country Conservation Advocates v. U.S.*  
 19 *Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (*High Country*) (holding that although  
 20 “NEPA does not require a cost-benefit analysis, it was nonetheless arbitrary and capricious to  
 21 quantify the *benefits* of the [coal] lease modifications and then explain that a similar analysis of the

22  
 23           <sup>21</sup> *See also Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (rejecting  
 24 argument that statute did not allow agency “to consider environmental factors” and holding that in  
 25 determining “whether an energy conservation measure is appropriate under a cost-benefit analysis,  
 26 the expected reduction in environmental costs needs to be taken into account”). Wyoming ignores  
 27 the binding precedent of *CBD v. NHTSA*, instead offering a red herring that agencies cannot consider  
 28 ancillary benefits. Wyo. Br. 23 (citing *Michigan*, 135 S. Ct. 2699). But Wyoming admits the Court  
 did not “directly answer[] this question.” *Id.* Moreover, the *Michigan* Court held that EPA erred by  
 not taking into account all relevant factors when regulating, including both direct and *indirect* costs.  
*See* 135 S. Ct. at 2709. Likewise, BLM's cost benefit analysis ignores critical costs.

1 *costs was impossible*”); *see also* BLM Br. 48 n.23 (acknowledging this holding). BLM cannot ignore  
 2 health costs when monetizing the Rescission’s economic *benefits* to operators, and then justify the  
 3 Rescission on that cost-benefit assessment.

4 Moreover, BLM’s claim that foregone public health benefits are not even “relevant,” BLM  
 5 Br. 48, is incorrect. *See supra* pp. 4–6. BLM has a statutory obligation under the Mineral Leasing  
 6 Act to “safeguard[] . . . the public welfare.” 30 U.S.C. § 187. Likewise, Federal Land Policy and  
 7 Management Act mandates that BLM prevent “unnecessary or undue degradation” to public lands,  
 8 43 U.S.C. § 1732(b), and “protect . . . air and atmospheric” values of public lands,” *id.* § 1701(a)(8).  
 9 These mandates require BLM to consider public health impacts like air and climate pollution.

10 BLM further claims that it is not required to monetize the Rescission’s public health costs  
 11 because it did not monetize the Waste Prevention Rule’s health benefits. BLM Br. 48. But the Waste  
 12 Prevention Rule’s cost-benefit analysis not before the Court. Moreover, not monetizing additional  
 13 health benefits did not “put a thumb on the scale” in the Waste Prevention Rule, *CBD v. NHTSA*,  
 14 538 F.3d at 1198, because BLM determined that the Rule’s other benefits outweighed the costs by a  
 15 large margin even without those additional benefits. Here, in contrast, BLM’s failure to assign any  
 16 value to these health costs could put a thumb on the scale. Because BLM has relied on its monetized  
 17 estimates of compliance costs to justify the Rescission, it cannot fail to weigh important foregone  
 18 health benefits. *See* Citizens Br. 24–25.

19 In conflict with its claim that such harms are not relevant, BLM acknowledges that volatile  
 20 organic compounds and air toxics have negative health impacts and asserts, without any supporting  
 21 analysis, that these impacts would be minimized because they are “dispersed.” BLM Br. 48. This is  
 22 entirely inadequate because the record shows the additional pollution caused by the Rescission has  
 23 health impacts on people living close to BLM-managed oil and gas development in many parts of the  
 24 country. *See* Citizens Br. 25. BLM’s speculative promise to consider health impacts in distinct and  
 25 future actions, BLM Br. 48–49, does not absolve it from considering the Rescission’s impacts now.  
 26 *See infra* pp. 36–37. Merely recognizing that volatile organic compounds and air toxics threaten  
 27 human health, without giving that fact *any weight* in the agency’s decision, “entirely failed to  
 28 consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43.

1           3.       *BLM overstates the foregone compliance costs (Issue C-3).*2       BLM also “puts a thumb on” the cost side of the scale by making the unsupported  
3       assumption that *no* operators have taken any steps to comply with the Waste Prevention Rule.  
4       Citizens Br. 25–26. BLM did the same thing in *California v. BLM*, where this court held that:5       [T]he monetary amount that operators have already spent or will need to spend in order  
6       to come into compliance is a numerical figure capable of being determined....  
7       Obtaining factual, objective data and values is not subject to ‘judgment calls.’  
8       Judgment calls are for the determination of subjective values, such as what the ‘best’  
9       course of action is or what constitutes reasonable doubt. Contrary to BLM’s assertion,  
9       its baseless calculation of industry cost savings is not a ‘judgment call’ entitled to  
deference, but rather an estimated figure that lacks a reasonable basis.10      286 F. Supp. 3d at 1069, 1076. BLM’s brief completely ignores this defect, failing again to support  
11      that same fundamental assumption underlying its cost-benefit analysis.12      Instead, BLM now claims it identified several “factors” supporting its “assumption,”  
13      including that some of the Waste Prevention Rule’s provisions phased in over time, and BLM’s own  
14      unlawful efforts to suspend and revise the Rule. BLM Br. 46–47. But BLM ignores that the Rule was  
15      in effect for much of the time since its promulgation in 2016. *See California v. BLM*, 286 F. Supp.  
16      3d at 1069. BLM now says it would not assume “operators acted unreasonably,” by complying with  
17      the rule. BLM Br. 47. But this ignores BLM’s own prior statements that operators should comply  
18      with the Rule, as well as statements by operators that they were in fact complying. Citizens Br. 26.19      Moreover, BLM’s concession that it “overstated” benefits of the Rescission cannot be  
20      overcome by its new unsupported claim that this overstatement “was counterbalanced by the  
21      potential for understatement of costs elsewhere.” BLM Br. 47–48; *see California v. BLM*, 286 F.  
22      Supp. 3d at 1069 (requiring “factual, objective data and values” when calculating costs and benefits).  
23      Nor does BLM’s claim that it did not monetize unidentified “other aspects of the rule” cure this  
24      defect. BLM Br. 47. This “unfounded assertion” is arbitrary. *CBD v. NHTSA*, 538 F.3d at 1202  
25      (rejecting “unfounded assertion” by agency that accurately accounting for benefits of rule would  
26      have required agency to account for other costs, and “the two would have balanced out”). BLM  
27      arbitrarily fails to support its key assumption underlying its finding of compliance cost savings.  
28

1       **III. The Rescission’s Environmental Analysis Violates NEPA (Issue D).**

2       BLM’s focus on operator profits at the expense of the public interest also is evident in its  
 3       flawed environmental assessment (EA), which ignores the impact of repealing nationwide rules  
 4       protecting the air, the climate, and Native American communities from harmful pollution emitted by  
 5       thousands of oil and gas wells. Citizens Br. 27–34. In fact, the Rescission’s significant impacts  
 6       warrant comprehensive analysis in an environmental impact statement (EIS). Citizens Br. 37–40.

7       **A. BLM’s analysis of health impacts is not “comprehensive,” and ignores impacts**  
 8       **on Native Americans altogether (Issues D-1a, D-1b).**

9       The Rescission will exacerbate air quality problems in areas that already violate federal  
 10      health standards, and will negatively affect the health and daily lives of Native Americans living in  
 11      the midst of extensive drilling. Citizens Br. 27–32. BLM ignores this Court’s conclusion that  
 12      suspending the Waste Prevention Rule for just one year would cause health risks in “at-risk  
 13      communities,” “leading to and exacerbating impaired lung functioning, serious cardiovascular and  
 14      pulmonary problems, and cancer and neurological damage.” *California v. BLM*, 286 F. Supp. 3d at  
 15      1073–74. Indeed, BLM’s EA violates the fundamental purpose of NEPA by failing to inform the  
 16      most impacted communities about the threats to their health that will result from permanently  
 17      rescinding these same protections. *See Anderson v. Evans*, 371 F.3d 475, 489–92 (9th Cir. 2002)  
 18      (agency’s failure to consider local impacts of management plan deemed a “major analytical lapse”);  
 19      *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1012, 1015 (9th Cir. 2009) (*Lockyer II*)  
 20      (requiring “hard look” before “taking substantive environmental protections off the books”).

21       BLM’s primary response is to claim that, in combination, the Rescission EA and Waste  
 22      Prevention Rule EA (incorporated by reference) include a “comprehensive discussion of health  
 23      impacts and impacts to low income and minority communities.” BLM Br. 50. Not so. The  
 24      Rescission EA simply contains a recognition that natural gas contains volatile organic compounds  
 25      and toxic air pollutants that “affect the health and welfare of humans.” AR315–16. BLM points to  
 26      the Rescission EA’s quantification of the Waste Prevention Rule’s foregone emission reductions.  
 27      BLM Br. 50. But quantifying emissions does not inform frontline communities about the threats to  
 28      their health, as NEPA requires. *See CBD v. NHTSA*, 538 F.3d at 1216 (rejecting EA that “quantifies  
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1 the expected amount of CO<sub>2</sub> emitted from light trucks,” but “does not discuss the *actual*  
 2 environmental effects resulting from those emissions”).

3 Nor does the Waste Prevention Rule EA’s general discussion of the “nature of air quality  
 4 impacts” related to oil and gas development fill the void. *Cal. ex rel. Lockyer*, 459 F. Supp. 2d 874,  
 5 905–08 (N.D. Cal. 2006) (*Lockyer I*) (holding the Forest Service’s EA for the Roadless Rule was not  
 6 a substitute for the repeal’s environmental analysis). Although BLM points to the Waste Prevention  
 7 Rule EA’s general discussion of air quality impacts on “humans,” it fails to point to any analysis of  
 8 the impacts to “at risk communities” living in areas that already exceed federal standards or those  
 9 that suffer disproportionate environmental impacts, like Native Americans. BLM Br. 50 (citing  
 10 AR1262–65, 1282–86). Under NEPA, BLM must not only disclose to these communities that they  
 11 are at greater risk, but also fully assess those risks. *Citizens for Better Forestry v. U.S. Dep’t of*  
 12 *Agric.*, 632 F. Supp. 2d 968, 981 (N.D. Cal. 2009) (rejecting EIS for nationwide rescission because  
 13 “it does not actually discuss the environmental consequences of eliminating the specific protections  
 14 that are provided in previous . . . rules”); *CBD v. NHTSA*, 538 F.3d at 1217.<sup>22</sup>

15 BLM acknowledges that it must consider the environmental justice implications of the  
 16 Rescission on Native Americans. BLM Br. 51; *see Standing Rock Sioux Tribe v. U.S. Army Corps of*  
 17 *Eng’rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017). But BLM offers no support for its claim that it did  
 18 so. BLM Br. 51. In fact, the pages BLM cites do not include a *single* reference to Native Americans  
 19 or the Rescission’s impacts on their already overburdened communities. *Id.* (citing AR1268, 1293,  
 20 1306).

21

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22 Moreover, circumstances have changed since BLM prepared the 2016 Waste Prevention Rule EA,  
 23 but the Rescission EA fails to address any new information regarding air quality. For example, BLM  
 24 has rescinded or is in the process of rescinding other air quality protections while at the same time  
 25 ramping up oil and gas leasing and permit approvals. *See infra* pp. 40–41 (discussing cumulative  
 26 impacts). EPA also has designated the Uinta Basin in Utah a nonattainment area under the Clean Air  
 27 Act. AR84146 (comments on proposed rule recognizing that designation was imminent). The  
 28 Rescission EA fails to consider these and other changes since 2016 that bear on air quality impacts.  
*Lockyer I*, 459 F. Supp. 2d at 905–08 (rejecting the Forest Service’s reliance on the Roadless Rule’s  
 “no action” alternative to support its rescission of the Rule because the “no action” alternative  
 considered the status quo when the Roadless Rule was adopted and did not account for changing  
 circumstances in the interim period).

1 BLM also disingenuously attempts to discount impacts to Native Americans by pointing to  
 2 the Waste Prevention Rule’s minimal adverse environmental impacts, like increased truck traffic.  
 3 BLM Br. 51. BLM’s EA acknowledges repeatedly that the Waste Prevention Rule’s environmental  
 4 benefits dwarfed its environmental impacts. *See* AR312, 313, 318; AR1297. Indeed, BLM estimates  
 5 that the Waste Prevention Rule decreased volatile organic compound emissions by five orders of  
 6 magnitude more than it increased the emissions from truck traffic. *See* AR316; *W. Watersheds*  
 7 *Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011) (NEPA analysis “must include a  
 8 discussion of adverse impacts that does not improperly minimize negative side effects”).

9 Developing a theme that the bigger the impact, the less analysis required, BLM relies heavily  
 10 on the excuse that it can ignore the Rescission’s public health and environmental justice impacts  
 11 because the rule’s scope is “national,” and the agency can conduct site-specific NEPA analysis at  
 12 later stages. BLM Br. 51–53; *see also id.* at 53 (attempting to distinguish *Standing Rock* because it  
 13 involved an action affecting a single tribe and the Rescission would affect many tribes). The  
 14 fundamental flaw in BLM’s argument is that this rulemaking is the *only* stage at which BLM will  
 15 consider the Rescission’s impacts. Any future site-specific analysis will be focused on the impacts of  
 16 the decision at issue—approving a land use plan, issuing a lease, or approving a drilling permit—  
 17 leaving the impact of rescinding the Waste Prevention Rule’s provisions wholly unstudied and  
 18 undisclosed to the public and thus unable to inform the rulemaking. National rules are subject to the  
 19 same standards for NEPA analysis as any other agency action. That such a rule will have localized  
 20 impacts is not an excuse to fail to consider those impacts. *See Anderson*, 371 F.3d at 489–92  
 21 (rejecting as a “major analytical lapse” agency’s failure to consider local impacts of broad  
 22 management plan).<sup>23</sup> If anything, the broad scale of impacted lands warrants more NEPA review, not  
 23

24 <sup>23</sup> BLM attempts to distinguish *Anderson* because the court found this error by reference to the  
 25 § 1508.27 significance factors, rather than the “hard look” requirement. BLM Br. 53 n.25. But the  
 26 “hard look” and “significance” factors are necessarily interrelated: BLM must take a hard look at all  
 27 impacts in the appropriate scale to determine their significance. *Anderson*, 371 F.3d at 492. BLM  
 28 implicitly acknowledges this interrelation when it cites the significance regulation to support its  
 argument that it took a hard look at public health and environmental justice impacts. BLM Br. 51  
 (citing 40 C.F.R. § 1508.27). As in *Anderson*, BLM’s failure to consider local impacts—here ozone  
 pollution and environmental justice—renders the Rescission EA unlawful.

1 less. *See Kraayenbrink*, 632 F.3d at 493 (holding BLM violated NEPA by glossing over  
 2 environmental impacts of weakening nationwide grazing regulations that would impact 25 million  
 3 acres); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027–28 (9th Cir. 2007) (recognizing that  
 4 nationwide scope of agency action warranted more NEPA analysis).

5 BLM offers little response to the Ninth Circuit’s repeated recognition that “NEPA is not  
 6 designed to postpone analysis of an environmental consequence to the last possible moment. Rather,  
 7 it is designed to require such analysis as soon as it can reasonably be done.” *Kern v. BLM*, 284 F.3d  
 8 1062, 1072 (9th Cir. 2002); *see* Citizens Br. 29 & n.15 (citing multiple cases). BLM attempts to  
 9 distinguish *Kern* because there, BLM “failed entirely” to analyze the impact in question. BLM Br.  
 10 53. The same is true here. BLM has failed entirely to consider the Rescission’s impacts in ozone  
 11 nonattainment areas and on Native Americans, and those impacts are essential to a reasoned and  
 12 informed national rule. Moreover, even if that distinction were valid, it did not affect the Ninth  
 13 Circuit’s conclusion that agencies must analyze issues in detail whenever there is enough  
 14 information available to “permit productive analysis.” *Kern*, 284 F.3d at 1073; Citizens Br. 28–29.

15 BLM also is wrong that it cannot engage in productive analysis of these issues at the  
 16 rulemaking stage. BLM Br. 52. The record contains ample evidence about these impacts. For  
 17 example, the Citizen Groups provided information about existing ozone nonattainment areas and  
 18 likely impacts in these areas. AR84145–46. Likewise, Native Americans living in areas with  
 19 substantial BLM-administered oil and gas development provided evidence of the disruption to their  
 20 daily lives. AR163173 (Fort Berthold resident explaining that “we are surrounded by well pads and  
 21 flares that have been burning for years,” and that “[o]ur air quality has changed . . . there’s a constant  
 22 haze over Fort Berthold from the hundreds of flares surrounding us”); *see also* AR83397–98;  
 23 AR83403–04 (similar). Furthermore, this Court does not have to resolve the precise level of detail  
 24 required because BLM has ignored these impacts altogether.

25 The Tenth Circuit’s decision in *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209 (10th Cir.  
 26 2011), is not to the contrary. BLM Br. 51. In *Wyoming*, the Tenth Circuit upheld a Forest Service  
 27 EIS analyzing the impacts of a nationwide regulation protecting roadless areas, despite its failure to  
 28 consider site-specific impacts in every roadless area. 661 F.3d at 1255–57. But unlike the Rescission  
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1 EA, the *Wyoming* EIS examined both the rule’s “general[ized]” impacts at a national scale, and  
 2 specific examples of “regional distinctions and site-specific aspects” where appropriate. *Id.* at 1256.  
 3 Here, the Rescission affects a discrete set of ozone nonattainment areas and environmental justice  
 4 communities. *See* AR84145–46, 161971. But the EA neither discusses these impacts at a nationwide  
 5 level, nor provides any relevant examples at a local level. *See* AR315–16. Moreover, *Wyoming*  
 6 involved a challenge to the Roadless Rule, which provided greater environmental protections and  
 7 therefore had few adverse impacts. 661 F.3d at 1224–25. When the agency *repealed* the Roadless  
 8 Rule and eliminated those protections, the Ninth Circuit held that more NEPA analysis was  
 9 necessary. *Lockyer II*, 575 F.3d at 1012–18. The same is true here.

10 **B. BLM fails to take a hard look at climate change impacts (Issue D-1c).**

11 The Rescission EA also violates the “hard look” rule by ignoring readily available science-  
 12 based metrics for assessing climate impacts. Citizens Br. 32–34. BLM does not dispute that it must  
 13 consider the “*actual* environmental effects resulting from [greenhouse gas] emissions.” *CBD v.*  
 14 *NHTSA*, 538 F.3d at 1216. Yet BLM’s response does not even attempt to square that requirement  
 15 with the EA’s statement that the Rescission’s “actual effects . . . on global climate change cannot be  
 16 reliably assessed,” AR319; *see* BLM Br. 53–55. The EA is wrong because the record shows there  
 17 are scientifically robust tools available to assess climate impacts, like the global social cost of  
 18 methane and carbon budgeting. Citizens Br. 32–34. It is arbitrary for an agency to quantify an  
 19 action’s benefits while ignoring its costs, where tools, like the social cost of methane and carbon  
 20 budgets, exist to calculate those costs. *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F.  
 21 Supp. 3d 1074, 1096–99 (D. Mont. 2017) (*MEIC*); *High Country*, 52 F. Supp. 3d at 1192–93.<sup>24</sup> That  
 22 is exactly what BLM did here, relying heavily on the Rescission’s reduced compliance costs while  
 23 claiming (incorrectly) that there are no tools to assess the full climate impacts.

24 BLM attempts to distinguish these cases because they involved “project-level” agency actions.  
 25 BLM Br. 54 n.26. But neither case holds that the social cost of carbon is only appropriate at the  
 26 project-level. Indeed, the social cost of carbon was designed “to allow agencies to incorporate the  
 27 social benefits of reducing carbon dioxide (CO<sub>2</sub>) emissions into cost-benefit analyses of *regulatory*  
 28 actions.” AR21862 (emphasis added).

Rather than rely on the EA, BLM points to the “interim” social cost of methane analysis in the RIA. BLM Br. 53–54 (citing AR41, 130).<sup>25</sup> As discussed *supra* pp. 28–31, the “interim” social cost of methane analysis violates NEPA’s mandate to use “[a]ccurate scientific analysis” and ensure “scientific integrity.” 40 C.F.R. §§ 1500.1(b), 1502.24. Despite previously arguing that the Court should defer to its scientific expertise in this matter, BLM Br. 42–43, BLM now claims that the standard for scientific integrity does not apply because it is a “policy choice,” *id.* at 53. BLM cannot have it both ways. BLM’s use of the “interim” social cost of methane lacks “scientific integrity” because the National Academies of Science concluded that an accurate assessment of domestic-only impact is not possible using the models that BLM used. *See supra* p. 29.

The RIA’s “interim” social cost of methane also fails to take a “hard look” at the Rescission’s climate impacts because it ignores both important domestic costs, like international trade and migration, and *all* global costs. *See* Citizens Br. 22; *see also* IPI Br. 12–17; AR84154–57, 84177–86, 22770–72. Nothing in NEPA allows BLM selectively to ignore certain impacts. *See* 40 C.F.R. § 1508.27(a) (requiring the “significance of an action must be analyzed in *several contexts* such as society as a whole (human, national), the affected region, the affected interests, *and* the locality” (emphasis added)); *MEIC*, 274 F. Supp. 3d at 1101–02 (holding that agency violated NEPA when it failed to “address foreseeable impacts beyond the region” caused by climate change); *Anderson*, 371 F.3d at 490 (explaining that NEPA analysis must consider the appropriate context).

Finally, BLM argues that courts have not mandated the use of the social cost of carbon or carbon budgeting. BLM Br. 54–55; *see also* API Br. 20. That is beside the point. While NEPA does not mandate any *particular* methodology, BLM must use *a* methodology that is accurate and defensible. *See Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (holding that agency’s “misleading” economic methodology violated NEPA’s “procedural

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<sup>25</sup> However, the RIA cannot fulfill NEPA’s hard look requirement. *See S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (“A non-NEPA document . . . cannot satisfy a federal agency’s obligations under NEPA.”); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 998 (9th Cir. 2004) (rejecting agency’s reliance on a study that was “not a NEPA document”).

1 requirement to present complete and accurate information to decision makers and to the public to  
 2 allow an informed comparison of the alternatives”). It has not done so here.

3 **C. BLM fails to consider cumulative impacts (Issue D-2).**

4 BLM’s cursory one-page cumulative impacts analysis fails to satisfy NEPA’s duty to  
 5 consider the “incremental impact of the action when added to other past, present, and reasonably  
 6 foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes  
 7 such other actions.” 40 C.F.R. § 1508.7; Citizens Br. 35–37. Tellingly, BLM’s response, like its EA,  
 8 does not identify a single other “past, present, and reasonably foreseeable future action” that it has  
 9 considered in combination with the Rescission. *See* BLM Br. 55–56; AR320–21. BLM once again  
 10 tries to overcome its deficiencies by pointing to the Waste Prevention Rule EA. BLM Br. 55. But the  
 11 2016 “status quo” analysis does not encompass the cumulative impacts of the Rescission in  
 12 combination with other reasonably foreseeable actions in 2018.

13 BLM’s claim that it analyzed the Rescission’s cumulative impacts in combination with  
 14 BLM’s fossil fuel program by simply quantifying the Rescission’s methane emissions misses the  
 15 point. BLM Br. 56. BLM is responsible for managing and permitting all federal and Indian fossil  
 16 fuel (coal, oil, and gas) production nationwide. Citizens Br. 36–37. The Rescission’s methane  
 17 emissions are only one part of the climate pollution BLM authorizes, which also includes other  
 18 emissions from both producing and combusting federal fossil fuels. AR21185, 84160, 84164. By  
 19 failing to consider these cumulative impacts, BLM fails to give the public a sense of how the  
 20 Rescission contributes to the larger climate picture. *See CBD v. NHTSA*, 538 F.3d at 1216–17  
 21 (rejecting agency’s cumulative impact analysis for emissions from certain model years of light  
 22 trucks that ignored emissions from other model years of light trucks and passenger vehicles); *Hall v.*  
 23 *Norton*, 266 F.3d 969, 978–79 (9th Cir. 2001) (rejecting BLM’s cumulative impact analysis that  
 24 ignored emissions from other BLM-managed projects in the region). At a minimum, BLM must  
 25 consider the cumulative emissions from the federal oil and gas program.

26 Notably, API, not BLM, argues that analyzing the cumulative impacts of BLM’s oil and gas  
 27 leasing program would be “unprecedented” and “[in]feasible.” API Br. 20. But the fact that BLM  
 28 has not analyzed its cumulative fossil fuel emissions says nothing about the legality or feasibility of  
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1 the analysis in this case. Once BLM undertakes such an analysis, it could tier to it for many site-  
 2 specific actions. 40 C.F.R. § 150.20. Nor is the analysis impossible. *See WildEarth Guardians v.*  
 3 *Zinke*, 368 F. Supp. 3d 41, 77 (D.D.C. 2019) (requiring BLM consider cumulative climate impacts  
 4 for “BLM lease sales in the region and nation”). In fact, the Citizen Groups identified several non-  
 5 governmental studies that have already analyzed the cumulative climate impacts of the federal fossil  
 6 fuel program. *See* AR21185, 84159–60.

7 BLM also claims that it did not need to consider the cumulative impacts of EPA also  
 8 rescinding its methane emissions standards because EPA published its proposed rescission in the  
 9 Federal Register two weeks after BLM promulgated the Rescission. BLM Br. 55–56. However,  
 10 BLM fails to address its own NEPA regulations requiring consideration of “[r]easonably foreseeable  
 11 future actions” including “federal... activities not yet undertaken, but sufficiently likely to occur.”  
 12 43 C.F.R. § 46.30; *see also N. Plains Res. Council v. Surface Trans. Bd.*, 668 F.3d 1067, 1079 (9th  
 13 Cir. 2011) (concluding that future development of coal bed methane wells was reasonably  
 14 foreseeable). BLM does not claim that EPA’s proposal was not reasonably foreseeable. Indeed, both  
 15 BLM and EPA were directed to rescind the regulations in the same Executive Order, AR1874, and  
 16 EPA’s proposal was made public *before* the Rescission was finalized. Nor does EPA’s proposal have  
 17 minimal impacts, as BLM suggests. BLM Br. 56. It would increase emissions of methane by  
 18 380,000 tons annually, 83 Fed. Reg. 52,056, 52,059 (Oct. 15, 2018), causing almost twice the  
 19 emissions of the Rescission. Regardless, any discussion of the scale of the impacts should be in the  
 20 environmental analysis, and should not appear for the first time in BLM’s brief. *Cal. PUC*, 879 F.3d  
 21 at 978 n.5 (holding courts “may not accept . . . post hoc rationalizations for agency action”).

22 **D. The Rescission’s significant impacts require an EIS (Issue D-3).**

23 BLM admits that it must prepare an EIS if there are “substantial questions” about whether the  
 24 Rescission will have significant impacts. BLM Br. 56. The Rescission satisfies this low bar: it  
 25 eliminates national environmental standards that would have prevented hundreds of thousands of  
 26 tons of pollution from thousands of oil and gas wells each year. Citizens Br. 37–40; *see also*  
 27 *Bosworth*, 510 F.3d at 1026–30 (finding impacts of relaxing nationally applicable environmental  
 28 standards to be significant). The Rescission is significant under NEPA’s public health, cumulative  
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1 impacts, uncertainty, and controversy factors. *See* 40 C.F.R. 1508.27(b). Satisfying any one of these  
 2 factors may require an EIS. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th  
 3 Cir. 2004). BLM's attempt to discount each of these factors falls short.<sup>26</sup>

4 First, the Rescission significantly harms public health. BLM's only response is that the  
 5 Rescission's public health impacts are insignificant because they will be “geographically dispersed”  
 6 and occur in ‘sparsely populated areas.’” BLM Br. 57 (quoting AR336). The fact that an area is  
 7 sparsely populated says nothing about the significance of the impacts to the people that live in areas  
 8 surrounded by BLM-managed oil and gas wells, and nothing in NEPA allows BLM to ignore these  
 9 public health impacts. This Court has held that the air pollution from even a small number of oil and  
 10 gas wells will affect public health and safety and trigger the requirement to prepare an EIS. *Ctr. for*  
 11 *Biological Diversity v. BLM*, 937 F. Supp. 2d 1140, 1158 (N.D. Cal. 2013) (*CBD v. BLM*). Here,  
 12 emissions from tens of thousands of wells are at stake. The Rescission will significantly harm the  
 13 health of Native American communities, including the Navajo Nation and the Fort Berthold  
 14 Reservation, and communities in Colorado, Utah, and New Mexico with unhealthy ozone levels.  
 15 AR161895–912, 161941–67, 161969–76.

16 Contrary to BLM's claims, BLM Br. 57, the Citizen Groups have more than met their burden  
 17 to raise “substantial questions” about whether the Rescission Rule's impacts may be significant. *See*  
 18 *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1105 (9th Cir. 2011). For example,  
 19 the Citizen Groups have identified more than 6,000 BLM-managed wells in ozone non-attainment  
 20 areas where pollution will increase due to the Rescission. *See, e.g.*, AR22632–34 (identifying more  
 21 than 6,000 BLM-managed wells in ozone non-attainment areas where pollution will increase due to  
 22 the Rescission). Likewise, the Citizen Groups have shown that, at times, ozone pollution levels in  
 23

24 <sup>26</sup> API and BLM argue that because the Citizen Groups did not challenge the Waste Prevention Rule  
 25 EA, the Rescission Rule EA is not illegal. API Br. 18–19; BLM Br. 52 n.24. This argument is  
 26 meritless. The validity of the Waste Prevention Rule's EA is not before this court. In any event, the  
 27 significance of an action to protect communities from the harmful impacts of oil and gas drilling  
 28 pollution is very different from the significance of an action to expose them to increased levels of  
 harmful pollutants. Citizens Br. 40 n.19; *see also Lockyer II*, 575 F.3d at 1018 (“It was unreasonable  
 for the [agency] to characterize the permanent repeal of these substantive protections as ‘merely  
 procedural’”).

1 Utah’s Uinta Basin have reached more than double the federal health standard, AR20316; *see*  
 2 *generally* AR23908, 84146, and 23% of Native Americans in the area live within 0.5 miles of an oil  
 3 and gas well, AR161902–03, 161971–73, 161975. The Rescission’s significant public health impacts  
 4 require further analysis in an EIS.

5 Second, the Rescission will have significant effects when considered cumulatively with other  
 6 actions, including BLM’s fossil fuel program and EPA’s proposed methane rule. BLM attempts to  
 7 downplay the significance of EPA’s nationwide rule, BLM Br. 58, without even considering the  
 8 expected 380,000 tons of increased annual methane emissions. 83 Fed. Reg. at 52,059. The Citizen  
 9 Groups have shown that the two federal agencies that regulate emissions from oil and gas wells are  
 10 both rescinding important protections nationwide, which is more than sufficient to show that there  
 11 are “substantial questions” about the significance of those combined impacts. *Te-Moak Tribe of W.*  
 12 *Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 605 (9th Cir. 2010) (holding that a  
 13 plaintiff’s burden to show that agency overlooked cumulative in its NEPA analysis “is not an  
 14 onerous one”); *CBD v. BLM*, 937 F. Supp. 2d at 1157–58. Absent some consideration, BLM cannot  
 15 dismiss them as insignificant.

16 Third, BLM does not dispute that it must prepare an EIS if the action is “highly  
 17 controversial,” meaning “there is a substantial dispute [about] the size, nature, or effect” of the  
 18 action. BLM Br. 58 (quoting *Pub. Citizen v. Dep’t of Transp.*, 316 F.3d 1002, 1027 (9th Cir. 2003),  
 19 *rev’d on other grounds*, 541 U.S. 752 (2004))). BLM claims the dispute over its decision to use the  
 20 “interim” social cost of methane—which reduces the Rescission’s projected climate impacts by 96%  
 21 or 87% (depending on the discount rate used) when compared to the peer-reviewed interagency  
 22 social cost of methane, AR84090—is not such a dispute. As discussed *supra* pp. 28–31, BLM’s  
 23 “interim” metric is not valid. At a minimum, however, BLM’s insistence on its validity in the face of  
 24 objections from numerous experts amounts to a substantial dispute with respect to whether this  
 25 “interim” methodology accurately reflects the Rescission’s climate impacts. *See* AR206–07, 83411,  
 26 83414, 83419–31, 83471; *CBD v. BLM*, 937 F. Supp. 2d at 1158 (“[T]he serious concerns raised by  
 27 federal and state agencies specifically charged with protecting the environment [may] support a  
 28

1 finding that an EIS is necessary.” (internal quotation omitted)).<sup>27</sup> Although BLM’s “interim” metric  
 2 should be rejecting outright, at a minimum, it warrants full examination in an EIS.

3 Fourth, BLM fails to explain why the “uncertainties” it identifies in assessing the  
 4 Rescission’s climate impacts does compel a finding of significance. *See* AR308. BLM does not  
 5 attempt to square the FONSI’s statement that “the actual environmental effects attributable to the  
 6 [Rescission’s] impact on climate change, cannot be reliably assessed and thus are sufficiently  
 7 uncertain,” AR336, with its conflicting statement in the same document that “there are no reasonably  
 8 foreseeable environmental effects that are considered to be highly uncertain,” AR337. BLM cannot  
 9 have it both ways. Additionally, BLM’s argument that the climate impacts are not uncertain because  
 10 it regulated venting and flaring under NTL-4A for decades is a red herring. BLM Br. 59. BLM never  
 11 analyzed NTL-4A’s climate impacts. In the end, BLM has provided no reason that it was not  
 12 mandated to consider the Rescission’s significant impacts in an EIS.

13 **VI. The Appropriate Remedy Is To Vacate the Rescission and Reinstate the Waste  
 14 Prevention Rule (Issue E).**

15 BLM does not contest—nor could it—that the default APA remedy for an invalid regulation  
 16 is vacatur of the rule and reinstatement of the rule previously in force. *See Organized Vill. of Kake v.*  
 17 *U.S. Dep’t of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (*en banc*); *Lockyer II*, 575 F.3d at 1020–21;  
 18 *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). There is no reason to depart from that norm.

19 BLM has tried—unsuccessfully—to stay, suspend, and rescind the Waste Prevention Rule  
 20 for years. Joint Statement Regarding Procedural History 3–7, ECF No. 98 (March 1, 2019). BLM’s  
 21 latest attempt to undermine the Rule is to argue that even if the court finds the Rescission to be  
 22 unlawful, it should grant remand without vacatur, or “stay” vacatur, to allow BLM to implement an  
 23 interim remedy. BLM Br. 60. That result would be contrary to Ninth Circuit precedent, and deeply  
 24 prejudicial to the Citizen Groups. The Ninth Circuit declines to vacate unlawful agency actions only

25  
 26 <sup>27</sup> To prop up its argument that the Rescission’s use of the “interim” methodology is not  
 27 controversial, BLM points to a case in which no one objected to the agency’s methodology, and less  
 28 than one ton of carbon dioxide emissions was at stake. BLM Br. 58–59 (citing *WildEarth Guardians*,  
 368 F. Supp. 3d at 81–82, 83). By contrast here, using the interagency, rather than the “interim”  
 social cost of methane significantly changes the magnitude of the Rescission’s impacts. AR84090.

1 in “rare” circumstances. *Humane Soc’y of the U.S.*, 626 F.3d at 1053 n.7; *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000) (“[W]e have held that agency action taken without observance of the procedure required by law will be set aside.” (internal quotation marks omitted)); *Reed v. Salazar*, 744 F. Supp. 2d 98, 119 (D.D.C. 2010) (holding vacatur is “default remedy” for NEPA violation). In the past, it has done so where vacatur would defeat a statute’s purpose. *See, e.g.*, *Idaho Farm Bureau Fed’n*, 58 F.3d at 1405–06 (declining to vacate because setting aside listing of snail species as endangered would risk potential extinction); *Cal. Cmtys. Against Toxics v. U.S. Envtl. Prot. Agency*, 688 F.3d 989, 994 (9th Cir. 2012) (remanding without vacatur because vacating could increase air pollution, undermining the Clean Air Act’s goals). Here, vacatur would not undermine the goals of the statutes at issue—as discussed *supra* pp. 4–6, it would advance them.

11 BLM asks this Court to deviate from the default remedy because operators are not poised to  
 12 comply with the Rule due to BLM’s serial unlawful attempt to relieve them of compliance  
 13 obligations, and reinstatement will likely reactivate litigation over the Waste Prevention Rule. BLM  
 14 Br. 60. BLM identifies no case law to suggest that these are relevant factors. Indeed, neither of the  
 15 Ninth Circuit cases BLM cites, BLM Br. 59–60, support remand without vacatur. *See Safe Air For*  
 16 *Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007) (applying the default remedy of  
 17 remand *with* vacatur); *United States v. Afshari*, 426 F.3d 1150, 1156 (9th Cir. 2005) (in a criminal  
 18 case, recognizing in dicta that “[t]hough not entirely uncontroversial,” remand without vacatur is not  
 19 unheard of under the Administrative Procedure Act). And the D.C. Circuit case BLM cites  
 20 recognized that vacatur is the default remedy, but remanded without vacatur only because “[t]he egg  
 21 has been scrambled and there is no apparent way to restore the status quo ante.” *Sugar Cane*  
 22 *Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). No similar circumstance  
 23 exists here.

## 24 CONCLUSION

25 Because the Rescission violates the Mineral Leasing Act, APA and NEPA, this Court should  
 26 grant the default remedy of declaring the Rescission unlawful, vacating it in its entirety, and  
 27 reinstating the Waste Prevention Rule.

1 Respectfully submitted this 2nd day of October, 2019,

2 /s/ Stacey Geis  
3 Stacey Geis, CA Bar # 181444  
4 Earthjustice  
5 50 California St., Suite 500,  
6 San Francisco, CA 94111-4608  
7 Phone: (415) 217-2000  
8 Fax: (415) 217-2040  
9 sgeis@earthjustice.org

10 Robin Cooley, CO Bar # 31168 (*admitted pro hac vice*)  
11 Joel Minor, CO Bar # 47822 (*admitted pro hac vice*)  
12 Earthjustice  
13 633 17<sup>th</sup> Street, Suite 1600  
14 Denver, CO 80202  
15 Phone: (303) 623-9466  
16 rcooley@earthjustice.org  
17 jminor@earthjustice.org

18 *Attorneys for Plaintiffs Sierra Club, Fort Berthold Protectors of Water and Earth  
19 Rights, The Wilderness Society, and Western Organization of Resource Councils*

20 Susannah L. Weaver, DC Bar # 1023021 (*admitted pro hac vice*)  
21 Donahue, Goldberg, & Weaver LLP  
22 1008 Pennsylvania Ave., SE  
23 Washington, DC 20003  
24 Phone: (202) 569-3818  
25 susannah@donahuegoldberg.com

26 Peter Zalzal, CO Bar # 42164 (*admitted pro hac vice*)  
27 Rosalie Winn, CA Bar # 305616  
28 Environmental Defense Fund  
18 2060 Broadway, Suite 300  
Boulder, CO 80302  
Phone: (303) 447-7214 (Mr. Zalzal)  
Phone: (303) 447-7212 (Ms. Winn)  
pzalzal@edf.org  
rwinn@edf.org

19 Tomás Carbonell, DC Bar # 989797 (*admitted pro hac vice*)  
20 Environmental Defense Fund  
21 1875 Connecticut Avenue, 6th Floor  
22 Washington, D.C. 20009  
23 Phone: (202) 572-3610  
24 tcarbonell@edf.org

1                   *Attorneys for Plaintiff Environmental Defense Fund*

2                   Laura King, MT Bar # 13574 (*admitted pro hac vice*)  
3                   Western Environmental Law Center  
4                   103 Reeder's Alley  
5                   Helena, MT 59601  
6                   Phone: (406) 204-4852  
7                   king@westernlaw.org

8                   Erik Schlenker-Goodrich, NM Bar # 17875 (*admitted pro hac vice*)  
9                   Western Environmental Law Center  
10                  208 Paseo del Pueblo Sur, #602  
11                  Taos, NM 87571  
12                  Phone: (575) 613-4197  
13                  eriksg@westernlaw.org

14                  *Attorneys for Plaintiffs Los Padres ForestWatch, Center for Biological Diversity,  
15                  Citizens for a Healthy Community, Diné Citizens Against Ruining Our Environment,  
16                  Earthworks, Montana Environmental Information Center, National Wildlife  
17                  Federation, San Juan Citizens Alliance, WildEarth Guardians, Wilderness Workshop,  
18                  and Wyoming Outdoor Council*

19                  Darin Schroeder, KY Bar # 93828 (*admitted pro hac vice*)  
20                  Ann Brewster Weeks, MA Bar # 567998 (*admitted pro hac vice*)  
21                  Clean Air Task Force  
22                  114 State Street, 6th Floor  
23                  Boston, MA 02109  
24                  Phone: (617) 624-0234  
25                  dschroeder@catf.us  
26                  aweeks@catf.us

27                  *Attorneys for Plaintiff National Wildlife Federation*

28                  Scott Strand, MN Bar # 0147151 (*admitted pro hac vice*)  
29                  Environmental Law & Policy Center  
30                  60 S. 6th Street, Suite 2800  
31                  Minneapolis, MN 55402  
32                  Phone: (312) 673-6500  
33                  Sstrand@elpc.org

34                  Rachel Granneman, IL Bar # 6312936 (*admitted pro hac vice*)  
35                  Environmental Law & Policy Center  
36                  35 E. Wacker Drive, Suite 1600  
37                  Chicago, IL 60601  
38                  Phone: (312) 673-6500  
39                  rgranneman@elpc.org

1                   *Attorneys for Plaintiff Environmental Law & Policy Center*

2                   David Doniger, DC Bar # 305383 (*admitted pro hac vice*)  
3                   Melissa Lynch, MA Bar # 689235 (*admitted pro hac vice*)  
4                   Natural Resources Defense Council  
5                   1152 15th St. NW, Suite 300  
6                   Washington, DC 20005  
7                   Phone: (202) 289-6868  
8                   ddoniger@nrdc.org  
9                   llynch@nrdc.org

10                   *Attorneys for Plaintiff Natural Resources Defense Council*